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Supreme Court, U.S.
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No. 03-475

In the Supreme Court of the United States

RICHARD B. CHENEY,
VICE PRESIDENT OF THE UNITED STATES, ET AL.,
PETITIONERS

v.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

JOINT APPENDIX
VOLUME I

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PETITION FOR WRIT OF CERTIORARI FILED: SEPT. 30, 2003
CERTIORARI GRANTED: DEC. 15, 2003

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
(WASHINGTON, DC)

Nos. 01:01-cv-01530-EGS

JUDICAL WATCH, INC., ET AL , PLAINTIFF

v.

NATIONAL ENERGY POLICY DEVELOPMENT GROUP
ET AL, DEFENDANT

Filed: July 16, 2001

DOCKET ENTRIES

DATE	DOCKET NUMBER	PROCEEDINGS
7/16/01	1	COMPLAINT against NATIONAL ENERGY POLICY DEVELOPMENT GROUP (Filing fee $150). Filed by JUDICAL WATCH, INC.,. (mjk,) (Entered: 07/25/2001)
	* * * * *	
2/15/02	24	AMENDED COMPLAINT. Filed by JUDICAL WATCH, INC.,. (Orfanedes, Paul) (Entered: 02/15/2002)
	* * * * *	

DATE	DOCKET NUMBER	PROCEEDINGS
4/5/02	54	ORDER consolidating Civil Action No. 01-1530 (EGS) and Civil Action No. 02-631 (EGS) and ordering all future pleadings to be filed under docket number 01-1530 (EGS).Signed by Judge Emmet G. Sullivan on 4/5/2002. (lcegs2,) (Entered: 04/05/2002)
	* * * * *	
05/28/02	80	AMENDED COMPLAINT Second. Filed by JUDICAL WATCH, INC.,. (Attachments: # 1 Exhibit 1# 2 Exhibit 2# 3 Exhibit 3# 4 Exhibit 4# 5 Exhibit 5# 6 Exhibit 6# 7 Exhibit 7# 8 Exhibit 8# 9 Exhibit 9# 10 Exhibit 10# 11 Exhibit 11) (Orfanedes, Paul) (Entered: 05/28/2002)
	* * * * *	
7/11/02	92	MEMORANDUM OPINION. Signed by Judge Emmet G. Sullivan on 7/11/2002. (lcegs2,) (Entered: 07/11/2002)

DATE	DOCKET NUMBER	PROCEEDINGS
7/11/02	93	ORDER. Signed by Judge Emmet G. Sullivan on 7/11/2002. (lcegs2,) (Entered: 07/11/2002)
7/19/02	94	STATUS REPORT – DISCOVERY PLAN by SIERRA CLUB. (Attachments: # 1 Exhibit A # 2 Exhibit B) (Gallagher, Patrick) (Entered: 07/19/2002)
	* * * * *	
8/2/02	101	ORDER approving plaintiffs' proposed discovery plan and scheduling Status Conference for 9/13/2002 10:00 AM in Courtroom 1. Signed by Judge Emmet G. Sullivan on 8/2/2002. (lcegs2,) (Entered: 08/02/2002)
	* * * * *	
9/3/02	120	MOTION for Protective Order by RICHARD CHENEY. (Millet, Thomas) (Entered: 09/03/2002)

DATE	DOCKET NUMBER	PROCEEDINGS
9/3/02	121	MOTION for Protective Order Memorandum in support by RICHARD CHENEY. (Millet, Thomas) (Entered: 09/03/2002)
9/3/02	122	AFFIDAVIT re 120, 121 by Karen Knutsen by RICHARD CHENEY. (Millet, Thomas) (Entered: 09/03/2002)
		* * * * *
10/17/02	154	ORDER denying Motion for Protective Order 120, denying Motion for Protective Order 121, setting briefing schedule and hearing date for motion to stay. Signed by Judge Emmet G. Sullivan on October 17, 2002. (lcegs2) (Entered: 10/17/2002)
		* * * * *

DATE	DOCKET NUMBER	PROCEEDINGS
10/21/02	158	MOTION to Stay Pending Appeal by Andrew Lundquist and by JOSHUA BOLTON, RICHARD CHENEY, LARRY LINDSEY, NATIONAL ENERGY POLICY DEVELOPMENT GROUP. (Paisner, Jennifer) (Entered: 10/21/2002)
10/23/02	159	MOTION for Leave to Appeal Pursuant to 28 U.S.C. sec. 1292(b) and for Expedited Consideration Of This Motion by Andrew Lundquist and by JOSHUA BOLTON, RICHARD CHENEY, LARRY LINDSEY, NATIONAL ENERGY POLICY DEVELOPMENT GROUP. (Paisner, Jennifer) (Entered: 10/23/2002)
		* * * * *
11/01/02	02	Minute Entry: Ruling held on 11/1/2002 before Emmet G. Sullivani; order to be issued electronically (Court Reporter Jackie Wood, Miller.) (clv,) (Entered: 11/01/2002)

DATE	DOCKET NUMBER	PROCEEDINGS
		* * * * *
11/7/02	181	NOTICE OF APPEAL re order of 11/1/02 [172], order of 10/17/02 135, and order of 9/9/02 154 by RICHARD CHENEY. Filing fee (government waived). counsel notified. (cdw,) Modified on 11/14/2002 (td,). (Entered: 11/12/2002)
11/13/02	182	ORDER on Defendants' Motion to Stay 158. Signed by Judge Emmet G. Sullivan on November 13, 2002. (lcegs2) (Entered: 11/13/2002)
		* * * * *
11/27/02	190	ORDER denying 159 160 Motion for Leave to Appeal pursuant to 28 U.S.C. 1292(b). Signed by Judge Emmet G. Sullivan on November 26, 2002. (lcegs2) (Entered: 11/27/2002)

DATE	DOCKET NUMBER	PROCEEDINGS
		* * * * *
9/30/03	199	ORDER denying without prejudice 143 Motion to Compel, denying without prejudice 144 Motion to Compel, and denying without prejudice 145 Motion to Compel, and administratively removing cases from the active calendar of the Court. Signed by Judge Emmet G. Sullivan on September 30, 2003. (lcegs2) (Entered: 09/30/2003)
		* * * * *

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
(WASHINGTON, DC)

No. 01:02-cv-0631-EGS

SIERRA CLUB, PLAINTIFF

v.

RICHARD CHENEY, VICE PRESIDENT, DEFENDANT

Filed: April 4, 2002

DOCKET ENTRIES

DATE	DOCKET NUMBER	PROCEEDINGS
		* * * * *
4/4/02	4	COMPLAINT against all defendants (Filing fee $0). Filed by SIERRA CLUB. (jeb,) (Entered: 07/26/2002)
4/5/02	2	ORDER consolidating Civil Action No. 01-1530 (EGS) and Civil Action No. 02-631 (EGS) and ordering all future pleadings in these consolidated cases to be filed under No. 01-1530.Signed by Judge Emmet G. Sullivan on 4/5/2002. (lcegs2,) (Entered: 04/05/2002)

DATE	DOCKET NUMBER	PROCEEDINGS
		* * * * *
11/7/02	6	NOTICE OF APPEAL re orders of 11/13/02 182, 10/17/02 154 and 9/9/02 135 filed in 01cv1530. Filing Fee: (government waived). (td,) (Entered: 11/14/2002)
11/27/02	7	ORDER denying defendants' motion to certify pursuant to 28 U.S.C. 1292(b). Signed by Judge Emmet G. Sullivan on November 26, 2002. (lcegs2) (Entered: 11/27/2002)
		* * * * *

UNITED STATES COURT APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 02-5355 and 02-5356

SIERRA CLUB, PLAINTIFF -APPELLEE

v.

RICHARD B. CHENEY, VICE PRESIDENT OF THE UNITED STATES, DEFENDANT-APPELLANT

NATIONAL ENERGY POLICY DEVELOPMENT GROUP; ANDREW LUNDQUIST, EXECUTIVE DIRECTOR; SPENCER ABRAHAM, SECRETARY FOR DEPARTMENT OF ENERGY; DONALD L. EVANS, SECRETARY OF COMMERCE; GALE A. NORTON, SECRETARY OF INTERIOR; ANN M. VENEMAN, SECRETARY OF AGRICULTURE; JOHN W. SNOW, SECRETARY OF TREASURY; NORMAN Y. MINETA, SECRETARY OF TRANSPORTATION; CHRISTINE TODD WHITMAN, ADMINISTRATOR OF ENVIRONMENTAL PROTECTION AGENCY, DEFENDANTS -APPELLEES

JUDICIAL WATCH, INC., PLAINTIFF-APPELLEE

v.

NATIONAL ENERGY POLICY DEVELOPMENT GROUP, DEFENDANT -APPELLEE

RICHARD B. CHENEY, VICE PRESIDENT OF THE UNITED STATES, DEFENDANT -APPELLANT

JOHN W. SNOW, SECRETARY OF THE TREASURY; GALE A. NORTON, SECRETARY OF THE INTERIOR; ANN M. VENEMAN, SECRETARY OF AGRICULTURE; DONALD L. EVANS, SECRETARY OF COMMERCE; NORMAN Y. MINETA, SECRETARY OF TRANSPORTATION; SPENCER ABRAHAM, SECRETARY OF ENERGY; COLIN L. POWELL, SECRETARY OF STATE; JOSEPH M. ALLBAUGH, DIRECTOR, FEDERAL EMERGENCY MANAGEMENT AGENCY; CHRISTINE TODD WHITMAN, ADMINISTRATOR, ENVIRONMENTAL PROTECTION AGENCY; PAT WOOD, III, CHAIRMAN, FEDERAL ENERGY REGULATORY COMMISSION; MITCHELL E. DANIELS, JR., DIRECTOR, OFFICE OF MANAGEMENT AND BUDGET; JOSHUA BOLTON, ASSISTANT TO THE PRESIDENT AND DEPUTY CHIEF OF STAFF FOR POLICY; LARRY LINDSEY, ASSISTANT TO THE PRESIDENT FOR ECONOMIC POLICY; JOHN D. ASHCROFT, U.S. ATTORNEY GENERAL, DEFENDANTS -APPELLEES

Filed: November 13, 2002

DOCKET ENTRIES

DATE	PROCEEDINGS
11/13/02	CIVIL-US CASE docketed. Notice of Appeal filed by Appellant Richard B. Cheney. [713654-1] (sha) [02-5356]

DATE	PROCEEDINGS
11/13/02	CLERK'S ORDER filed [713686] to consolidate cases [713686-1]. [Entry Date: 11/14/02] [02-5355, 02-5356] (sha) [02-5355 02-5356]
	* * * * *
12/6/02	PER CURIAM ORDER filed, considering the motion for stay pending appeal [713212]. It is ORDERED, on the court's own motion, that case Nos. 02-5354, 02-5355, and 02-5356 be consolidated [718152-1], It is FURTHER ORDERED, on the court's own motion, that the Clerk schedule these cases for oral argument in the normal course [718152-2]. The cases will be considered on the basis of the pleadings previously filed by the parties. It is FURTHER ORDERED, on the court's own motion, that the district court's orders under review in these actions be stayed pending further order of the court [718152-3]. The purpose of this administrative stay is to give the court sufficient opportunity to consider the merits of the case and should not be construed in any way as a ruling on the merits. [SEE THE ORDER FOR MORE DETAILS] Before Judges: Edwards, Sentelle, and Tatel. [Entry Date: 12/6/02]. [02-5354, 02-5355, 02-5356] (jth) [02-5354 02-5355 02-5356]

DATE	PROCEEDINGS
	* * * * *
4/17/03	ORAL ARGUMENT HELD before Edwards, Randolph, Tatel . [02-5354, 02-5355, 02-5356] (vew) [02-5354 02-5355 02-5356]
	* * * * *
7/8/03	JUDGMENT dismissing the petition for mandamus and granting the motions to dismiss for the reasons in the accompanying opinion. Before Judges Edwards, Randolph, Tatel. [Entry Date: 7/8/03] [02-5354, 02-5355, 02-5356] (mcm) [02-5354 02-5355 02-5356]
7/8/03	OPINION filed [758760] (20 pgs) for the Court by JudgeTatel, CONCURRING OPINION (5 pgs) filed by Judge Edwards, DISSENTING OPINION (12 pgs) filed by Judge Randolph [02-5354, 02-5355, 02-5356] (mcm) [02-5354 02-5355 02-5356]
	* * * * *

DATE	PROCEEDINGS
8/8/03	PETITION FOR REHEARING [765608-1], PETITION FOR REHEARING EN BANC [765608-2] in Nos. 02-5354, 02-5355, and 02-5356 (20 copies) filed by Petitioner /Appellants Richard Cheney, et al. (certificate of overnight mail service dated 8/8/03) [02-5354, 02-5355, 02-5356] (jth) [02-5354 02-5355 02-5356]
	* * * * *
9/10/03	PER CURIAM ORDER, En Banc, filed [771393] denying suggestion rehearing en banc [765608-2] filed by Richard B. Cheney. Before Judges Ginsburg, Edwards, Sentelle,* Henderson,** Randolph,* Rogers, Tatel, Garland, Roberts.* [Entry Date: 9/10/03] [02-5354, 02-5355, 02-5356] (*Circuit Judges Sentelle, Randolph and Roberts would grant the petition for rehearing en banc) (**Circuit Judge Henderson did not participate in this matter) (mcm) [02-5354 02-5355 02-5356]
9/10/03	PER CURIAM ORDER filed [771397] denying petition rehearing [765608-1] filed by Richard B. Cheney. (Mandate may issue or after 9/18/03) Before Judges Edwards, Randolph,* Tatel. (Circuit Judge Randolph would grant the petition

DATE	PROCEEDINGS
	for rehearing) [Entry Date: 9/10/03] [02-5354, 02-5355, 02-5356] (mcm) [02-5354 02-5355 02-5356]
	* * * * *
9/30/03	PER CURIAM ORDER (w/ attached statement) filed [775055] denying motion stay mandate [772667-1] filed by Richard B. Cheney, et al. (Mandate to issue on 10/7/03 in 02-5355, in 02-5356) Before Judges Edwards, Randolph,* Tatel. (Circuit Judge Randolph would grant the motion to stay the mandate) (A separate statement of Circuit Judge Edwards, concurring in the denial of the motion to stay the mandate, in which Circuit Judge Tatel joins, is attached) [Entry Date: 9/30/03] [02-5355, 02-5366] (mcm) [02-5355 02-5356]
	* * * * *
10/29/03	MANDATE ISSUED to Clerk, District Court [781556-1] [02-5355, 02-5356] (mcm) [02-5355 02-5356]
	* * * * *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 01-1530 (EGS)

JUDICIAL WATCH, INC., PLAINTIFF

v.

NATIONAL ENERGY POLICY DEVELOPMENT GROUP; THE HON. RICHARD B. CHENEY, VICE PRESIDENT OF THE UNITED STATES; PAUL O' NEILL, SECRETARY OF THE TREASURY; GAIL NORTON, SECRETARY OF THE INTERIOR; ANN M. VENEMAN, SECRETARY OF AGRICULTURE; DONALD EVANS, SECRETARY OF COMMERCE, NORMAN MINETA, SECRETARY OF TRANSPORTATION; SPENCER ABRAHAM, SECRETARY OF ENERGY; COLIN POWELL, SECRETARY OF STATE; JOSEPH M. ALLBAUGH, DIRECTOR, FEDERAL EMERGENCY, MANAGEMENT AGENCY; CHRISTINE TODD WHITMAN, ADMINISTRATOR, ENVIRONMENTAL PROTECTION AGENCY; PATRICK H. WOOD, III, CHAIRMAN, FEDERAL ENERGY REGULATORY, COMMISSION; MITCHELL E. DANIELS, JR., DIRECTOR, OFFICE OF MANAGEMENT AND BUDGET; JOSHUA BOLTON, ASSISTANT TO THE PRESIDENT AND DEPUTY CHIEF OF STAFF FOR POLICY; LARRY LINDSEY, ASSISTANT TO THE PRESIDENT FOR ECONOMIC POLICY; MARK RACICOT; HALEY BARBOUR; KENNETH LAY; THOMAS KUHN; JOHN AND JANE DOE NOS. 1-99, CERTAIN UNKNOWN NON-FEDERAL EMPLOYEES, AND/OR MEMBERS OF THE NATIONAL ENERGY POLICY DEVELOPMENT GROUP, DEFENDANTS

SECOND AMENDED COMPLAINT

Plaintiff, Judicial Watch, Inc., pursuant to the Court's Order of May 23, 2002, hereby files this second

amended complaint for compliance with the Federal Advisory Committee Act, 5 U.S.C. 5 App. 2 ("FACA"), the Administrative Procedure Act, 5 U.S.C. § 701 et seq. ("APA"), and the Freedom of Information Act, 5 U.S.C. § 552 *et seq.* ("FOIA"). Plaintiff also seeks a writ of mandamus and a declaratory judgment pursuant to 28 U.S.C. §1361 and 28 U.S.C. §§ 2201 and 2202, respectively. As grounds therefore, Plaintiff Judicial Watch, Inc., ("JW") respectfully alleges as follows:

JURISDICTION AND VENUE

1. This court has jurisdiction over this action pursuant to 28 U.S.C. § 1331 (action arising under the laws of the United States), 28 U.S.C. § 1346(a)(2) (United States as defendant), 5 U.S.C. § 552(a)(4)(B) (FOIA), 28 U.S.C. §1361 (mandamus), 5 U.S.C. § 701 (APA).

2. Venue is proper in this district pursuant to 5 U.S.C. § 552(a)(4)(B).

PARTIES

3. Plaintiff, whose principal place of business is 501 School Street, SW, Suite 725, Washington, D.C. 20024, is organized as a non-profit corporation under the laws of the District of Columbia. Plaintiff undertakes educational and other programs to promote and protect the public interest in matters of public concern. To this end, Plaintiff requested certain documents pursuant to the FACA and the FOIA and intends to disseminate the requested information and documents to its supporters and benefactors, government officials, appropriate news media, and to the American public at large. The information, access, and documents Plaintiff seeks are likely to contribute significantly to the public's

understanding of the operations and activities of Defendants.

4. Defendant National Energy Policy Development Group ("NEPDG") is an agency and entity of the United States Government. Defendant NEPDG was created by President George W. Bush and headed by Vice President Richard B. Cheney to develop a national energy plan. Defendant NEPDG has its principal place of business in Washington, DC. Defendant NEPDG has possession of the information and documents to which Plaintiff seeks access.

5. Defendant Richard B. Cheney ("Cheney") is the Vice President of the United States. Defendant Cheney is the director of NEPDG and has possession of the information and documents to which Plaintiff seeks access.

6. Defendant Paul O'Neill ("O'Neill") is Secretary of the Treasury. Defendant O'Neill is a member of NEPDG and has possession of the information and documents to which Plaintiff seeks access.

7. Defendant Gail Norton ("Norton") is Secretary of the Interior. Defendant Norton is a member of NEPDG and has possession of the information and documents to which Plaintiff seeks access.

8. Defendant Ann M. Veneman ("Veneman") is Secretary of Agriculture. Defendant Veneman is a member of NEPDG and has possession of the information and documents to which Plaintiff seeks access.

9. Defendant Donald Evans ("Evans") is Secretary of Commerce. Defendant Evans is a member of NEPDG and has possession of the information and documents to which Plaintiff seeks access.

10. Defendant Norman Mineta ("Mineta") is Secretary of Transportation. Defendant Mineta is a member of NEPDG and has possession of the information and documents to which Plaintiff seeks access.

11. Defendant Spencer Abraham ("Abraham") is Secretary of Energy. Defendant Abraham is a member of NEPDG and has possession of the information and documents to which Plaintiff seeks access.

12. Defendant Colin Powell ("Powell") is Secretary of State. Defendant Powell is a member of NEPDG and has possession of the information and documents to which Plaintiff seeks access.

13. Defendant Joseph M. Allbaugh ("Allbaugh") is the Director of the Federal Emergency Management Agency. Defendant Allbaugh is a member of NEPDG and has possession of the information and documents to which Plaintiff seeks access.

14. Christine Todd Whitman ("Whitman") is the Administrator of the Environmental Protection Agency. Defendant Whitman is a member of NEPDG and has possession of the information and documents to which Plaintiff seeks access.

15. Patrick H. Wood, III, ("Wood") is the Chairman of the Federal Energy Regulatory Commission. Defendant Wood is a member of NEPDG and has possession of the information and documents to which Plaintiff seeks access.

16. Mitchell E. Daniels, Jr., ("Daniels") is the Director of the Office of Management and Budget. Defendant Daniels is a member of NEPDG and has possession of the information and documents to which Plaintiff seeks access.

17. Joshua Bolton ("Bolton") is Assistant to the President and Deputy Chief of Staff for Policy. Defendant Bolton is a member of NEPDG and has possession of the information and documents to which Plaintiff seeks access.

18. Larry Lindsey ("Lindsey") is Assistant to the President for Economic Policy. Defendant Lindsey is a member of NEPDG and has possession of the information and documents to which Plaintiff seeks access.

19. Mark Racicot currently is Chairman of the Republican National Committee, 310 First Street, S.E., Washington, DC 20003 and has served as a lobbyist for Enron Corporation. On information and belief, Defendant Racicot is a member of NEPDG and has possession of the information and documents to which Plaintiff seeks access.

20. Haley Barbour is a lobbyist for electric utilities at Barbour, Griffith & Rodgers, 1275 Pennsylvania Avenue, N.W., Washington, DC 20004. Defendant Barbour formerly served as Chairman of the Republican National Committee. On information and belief, Defendant Barbour is a member of NEPDG and has possession of the information and documents to which Plaintiff seeks access.

21. Kenneth Lay is the former Chairman of Enron Corporation ("Enron"), of Houston, Texas. On information and belief, Defendant Lay is a member of NEPDG and has possession of the information and documents to which Plaintiff seeks access.

22. Thomas Kuhn is the President of the Edison Electric Institute, 701 Pennsylvania Avenue, N.W., Washington, DC 20004. On information and belief, Defendant Kuhn is a member of NEPDG and has

possession of the information and documents to which Plaintiff seeks access.

23. John and Jane Does Nos. 1-99 are currently unknown, non-federal employees who are members of the NEPDG and have possession of the information and documents to which Plaintiff seeks access.

STATEMENT OF FACTS

24. On January 29, 2001, President Bush established the NEPDG, whose mission was to "develop a national energy policy designed to help the private sector, and as necessary and appropriate Federal, State and local government, promote dependable, affordable, and environmentally sound promote dependable, affordable, and environmentally sound production and distribution of energy." President Bush directed the NEPDG to "gather information, deliberate, and . . . make recommendations to the President."

25. On information and belief, non-federal employees, including Thomas Kuhn, Kenneth Lay, Marc Racicot, Haley Barbour, representatives of the Clean Power Group, and other private lobbyists (John and Jane Does 1-99), regularly attended and fully participated in non-public meetings of the NEPDG as if they were members of the NEPDG, and, in fact, were members of the NEPDG.

26. Specifically, non-federal employees representing special energy interests, who donated approximately $22.5 million into the Bush-Cheney 2000 presidential election campaign, have reportedly enjoyed nearly unfettered access to and close contact with the NEPDG, Vice President Cheney, and even President Bush himself. Thomas Kuhn, a leading Bush fundraiser and president of the Edison Electric Institute, reportedly

met with Vice President Cheney. Kenneth Lay ("Lay"), the former CEO of the now bankrupt Enron and a friend of President Bush, had a dinner meeting with the President. *See* Howard Fineman and Michael Isikoff, "Big Energy at the Table," Newsweek, May 14, 2001, attached hereto as Exhibit 1 at 18.

27. In March 2001, Lay reportedly also met with Defendant Cheney to discuss energy policy. *See* Howard Fineman and Michael Isikoff, "A New Capitol Clash," Newsweek, February 11, 2002, attached as Exhibit 2. Bush administration officials subsequently admitted to five additional meetings between Enron officials and Vice President Cheney's staff in March 2001. *Id.* In addition to these six meetings in March 2001, a top aide to Defendant Cheney, Andrew Lundquist, met with members of the "Clean Power Group" —a coalition of five power companies, including Enron. *Id.*

28. In April 2001, Lay also reportedly met with Defendant Cheney to discuss the Bush Administration's response to the California energy crisis. *See* David Lazarus, "Memo Details Cheney-Enron Links," San Francisco Chronicle, January 30, 2002, attached as Exhibit 3. During this meeting, Lay reportedly handed Cheney three page memorandum urging federal authorities to refrain from imposing price caps or other measures to stabilize electricity prices. *Id.* Recommendations from this memorandum subsequently became a part of the NEPDG's proposed energy plan. *Id.*

29. On May 3, 2001, former Montana Governor Marc Racicot and former Republican Party Chairman Haley Barbour, both of whom serve or have served as lobbyists for electric utilities, attended a NEPDG meeting chaired by Vice President Cheney. *See* Michael

Weisskopf and Adam Zagorin, "Getting the Ear of Dick Cheney," Time, February 11, 2002, attached as Exhibit 4. At that time, Barbour also was involved heavily in fundrasing activities on behalf of President Bush. *Id.* Racicot currently is the Chairman of the Republican Party.

30. On May 4, 2001, David S. Addington, Counsel to Vice President Cheney, admitted in a letter to Reps. W.J. "Billy" Tauzin and Rep. John Dingell of the House Committee on Energy and Commerce, and Reps. Dan Burton and Henry Waxman of the Committee on Government Reform, that during so-called "stakeholder meetings," staff members of NEPDG held "have met with many individuals **who are not federal employees** to gather information relevant" to the NEPDG's work. *See* May 4, 2001 Letter from David S. Addington, attached as Exhibit 5 (emphasis added). All of the NEPDG so-called "stake-holder meetings" with non-governmental parties are covered by the FACA and the FOIA.

31. Vice President Cheney has been evasive in describing the staffing and operations of the NEPDG. During a July 25, 2001 on the ABC television program "Nightline," Vice President Cheney admitted that the NEPDG met with members of private organizations and/or companies regarding energy policy, but failed to identify the names of those individuals:

> [TED] KOPPEL: You've made reference to the enormous amount of experience that you bring to this job. So, I have to ask you, as someone who knows Washington as well as you do, and who knows that the one thing that drives Congress crazy, the one thing that drives the press crazy, the

one thing that is always going to be trouble is secrecy.

Vice Pres. CHENEY: Mm-hmm.

KOPPEL: Well, why did you run your—your energy study, your energy meetings the way that you did? Why to this day haven't you revealed who participated in those meetings and what they had to tell you?

Vice Pres. CHENEY: Well, that's simply not accurate, Ted. There's been this charge that it was run in secret. But it was run the same way we do everything else with respect to policy. Same way we make economic policy or education policy. It was a group of Cabinet officials and agency heads. This is the report we produced. We published thousands of them. It has not been secret. The folks that were responsible for putting it together are all listed right up here in the front. It's the Cabinet and the agency heads. . .

KOPPEL: What about the experts that you consulted? I mean, you—you know . . .

Vice Pres. CHENEY: But we didn't—I mean, there's—there was this allegation that somehow we did what the Clintons did back in '93 on health. We did not.

KOPPEL: Exactly.

Vice Pres. CHENEY: We were very sensitive to that and very careful of it. When you. . .

KOPPEL: Tell me where the—tell me where the difference is?

Vice Pres. CHENEY: Well, the—it's when you bring in . . . KOPPEL: What was different about what you did and what Hillary Clinton . . .

Vice Pres. CHENEY: . . . outsiders and incorporate them in the policy-making process, that then certain requirements with respect to federal advisory committees kicks in and certain requirements have to be met. We didn't do that. We did this exactly the same way, for example, that we put together the economic policy or tax policy. And there's been this claim that it was done in secret, but it wasn't. It wasn't anymore secret than anything else we do.

KOPPEL: The inference that people have drawn—but, before I get to that, let me just ask you, what—what is different about what Hillary Clinton did with the health program from what you folks did with the energy policy?

Vice Pres. CHENEY: She brought in outsiders, people who were not government employees, who were not full-time. . .

KOPPEL: You didn't do that?

Vice Pres. CHENEY: No.

KOPPEL: No outsiders?

Vice Pres. CHENEY: Well, not as part of the deliberating pro—process.

KOPPEL: Well . . .

Vice Pres. CHENEY: No, that's very important.

KOPPEL: . . . are you finessing that just a little bit too finely?

Vice Pres. CHENEY: No. No, you're mis—misreading what the statute says. There's a big difference. We meet all the time behind closed doors to make economic policy or to make education policy. Now, you may deal with outside groups. They may have points of view they want to represent. We heard from energy people. We heard from many environment people. We heard from consumer groups. I met with congressman and senators and governors. We heard from a broad variety of folks out there, but they were not in the meetings where we put together the policy and made recommendations to the president. That's the big difference.

KOPPEL: Isn't—isn't that a fine point?

Vice Pres. CHENEY: That's a very important point.

KOPPEL: In other words, if we—if we have one meeting here . . .

Vice Pres. CHENEY: Mm-hmm.

KOPPEL: . . .with a bunch of people, and because of your background and the president's background in the energy industry yourselves . . .

Vice Pres. CHENEY: Mm-hmm.

KOPPEL: . . . the assumption is that you did consult with a lot of your pals in the—in the energy industry. If you consult with them in this room, and then you adjourn to the next room to make policy, that—that . . .

Vice Pres. CHENEY: That's not the way it works.

KOPPEL: That satisfies the law?

Vice Pres. CHENEY: That is—that is not the way it worked. **In fact, we heard from a wide variety of different groups.** But we did not trigger the statute that specifically provides for how you deal with advisory committees, for formally constituted advisory committee that's making policy, like the Social Security Commission, for example. There's a classic example of a group of outside people, not full-time government employees, who are meeting to deliberate and to come up with a policy recommendation. They meet in open session. The press is present. You don't do that when you sit down, for example, with the—the secretary of the treasury and the Council of Economic Advisers and director of OMB to make major budget decisions, or make . . .

KOPPEL: But why not just take the wind out of the sails of all your critics and say, 'Here's a list of the people we consulted'?

See Transcript of ABC News: Nightline dated July 25, 2001, at 2-4 attached as Exhibit 6 (emphasis added).

32. On January 30, 2002, the General Accounting Office ("GAO") issued a decision concerning the NEPDG in which it specifically found that NEPDG had met with "selected non-governmental parties" in its efforts to develop a proposed national energy policy. *See* Decision of the Comptroller General Concerning NEPDG Litigation, January 30, 2002, attached as Exhibit 7.

33. The appearance of favoritism and access shown to these energy executives stands in stark contrast to the access the Bush-Cheney administration accorded to

other groups who thus far have received only a single mass meeting with lower level NEPDG staffers. *See* Exhibit 1.

34. Recent history has unfortunately seen several ethical lapses concerning conflicts of interest in The White House and violations of the FACA. In *Association of American Physicians and Surgeons v. Clinton*, 997 F.2d 898 (D.C. Cir. 1993) ("*AAPS*"), the DC Circuit remanded the case to the district court for discovery on the issue of whether the working group of the President's Task Force on National Health Care Reform constituted an advisory committee under FACA, despite sworn claims by one of the heads of the Task Force put forth by the Clinton-Gore Justice Department that it did not so qualify. In ordering this discovery to proceed, the DC circuit stated:

> We simply have insufficient material in the record to determine the character of the working group and its members . . . [A]s we have indicated, because we differ with the district court concerning the Task Force, we believe further proceedings, including expedited discovery, are necessary before the district court can confidently decide whether the working group is a FACA committee.

AAPS, 997 F. 2d at 915-916. When discovery proceeded in the district court, plaintiffs uncovered facts which conclusively showed that the working group of the Task Force did qualify as an advisory committee under the FACA. The White House was sanctioned for, in part, failing to comply with discovery requests concerning the applicability of the FACA, and for misleading the court about who was and who was not a

member of former First Lady Hillary Rodham Clinton's Health Care Task Force:

> The Department of Justice has a long tradition of setting the highest standards of conduct for all lawyers, and it is a sad day when this court must conclude, as did the United States Attorney in his investigation, that the Department of Justice succumbed to pressure from White House attorneys and others to provide this court with "strained interpretations" that were "ultimately unconvincing." This court goes further than the United States Attorney, however, because this court cannot agree that the Department of Justice never relied upon the "all-employee" exemption for the working group. Having been presented the "all-employee" facts in the Magaziner declaration, the Court of Appeals specifically found that defendants had made that argument. Neither the briefs on appeal, nor any transcript of the oral argument on appeal, was before this court. Yet the Department of Justice sat back and never told this court that it was not making, and had not made, such an argument, and never corrected any of the factual inaccuracies in the Magaziner declaration. The United States Attorney reported that this was a conscious decision because attorneys in the White House refused to allow any supplemental information to be provided to the court. It seems that some government officials never learn that the cover-up can be worse than the underlying conduct. Most shocking to this court, and deeply disappointing, is that the Department of Justice would participate in such conduct. This was not an issue of good faith word games being played with the court. The United States

Attorney found that the most controversial sentence of the Magaziner declaration—"Only federal government employees serve as members of the interdepartmental working group"—could not be prosecuted under the perjury statute because the issue of "membership" within the working group was a fuzzy one, and no generally agreed upon "membership" criteria were ever written down. Therefore, the Magaziner declaration was actually false because of the implication of the declaration that "membership" was a meaningful concept and that one could determine who was and was not a "member" of the working group. This whole dishonest explanation was provided to this court in the Magaziner declaration on March 3, 1993, and this court holds that such dishonesty is sanctionable and was not good faith dealing with the court or plaintiffs' counsel. It was not timely corrected or supplemented, and this type of conduct is reprehensible, and the government must be held accountable for it.

AAPS, 989 F. Supp. 8, 16-17 (D.D.C. 1997). In light of this history, Plaintiff believes it is particularly in the public interest for Bush-Cheney Administration officials and the NEPDG to avoid even an appearance of a possible conflict of interest, by acknowledging the application of FACA and the FOIA to all NEPDG meetings.

35. On June 25, 2001, Plaintiff sent a letter to Vice President Cheney, pursuant to the provisions of the FOIA and the FACA, 5 U.S.C. §§ 552 and App.2, requesting copies of all minutes and final decision documents of NEPDG meetings from January 20, 2001 to that date, as well as a complete listing, including addresses, of all persons and entities that participated

in NEPDG meetings, either directly or indirectly through agents and/or intermediaries. *See* June 25, 2001 Letter to The Hon. Richard B. Cheney, attached as Exhibit 8. Plaintiff also sought to attend all future meetings of the NEPDG pursuant to the FACA, and asked to be provided with future meeting schedules and contact information so that representatives of Plaintiff could attend these meetings. *Id.* Plaintiff's request was denied in its entirety on July 5, 2001. *See* July 5, 2001 Letter to Larry Klayman, attached as Exhibit 9.

36. GAO the investigative arm of Congress, also requested that the NEPDG disclose the names of individuals who met with the NEPDG, but has thus far been stonewalled in its efforts. *See* Joseph Kahn, "Cheney Withholds List of Those Who Spoke to Energy Panel," The New York Times, June 26, 2001 at A17; Express Wire Services, "Cheney Won't Give Up Names," June 26, 2001; Scott Lindlaw, "Congress Demands List of Participants in Cheney Energy Meetings," AP, June 25, 2001, attached collectively as Exhibit 10. After several weeks of making requests, the GAO finally received some documents regarding Defendant NEPDG's finances, but incredibly, Defendant NEPDG has, as of May 28, 2002, failed to provide a full accounting of the individuals who met with Defendant NEPDG to the GAO, Plaintiff, or to the public.

37. Along with Plaintiff, the GAO, and various members of the media, legal commentators have advocated a broad reading of the FACA's language which on its face does appear to cover a vast number of communications between agencies and non-governmental parties. In a widely cited article on the FACA, Michael H. Cardozo reasons:

> *In principle, any group of individuals, however selected or constituted, that considers governmental matters and furnishes views and conclusions to government officials or agencies, is a governmental advisory committee.* The FACA however, is concerned only with "public advisory committees," that is groups containing at least some members who are not government employees. Thus a committee containing any number of officers of government is not covered by the Act unless its membership includes outsiders, representatives of the "private sector."

Michael H. Cardozo, "The Federal Advisory Committee Act In Operation (Administrative Law Review, Vol. 33, 3 (1981) (emphasis added). Mr. Cardozo further reasons:

> A key part of the definition of "advisory committee" is the expression "established or utilized." Superficially this means that the origin of the group is not material in determining whether it is an advisory committee covered by the act. It must be a "group," however, meaning more than one person, and someone must bring them together. That act, whether done formally or informally, "establishes" the group. However the Act does not expressly require the establishment to be performed by a government official or agency. Under the strict language of the Act, even a group formed by private industry becomes an advisory committee if it is "utilized" by the president or by one or more agencies of the government.

Id. at 12-13. (Emphasis added.) Categorizing the types of advisory committees, Mr. Cardozo writes: "A

committee in any of the five functional categories may be assigned an 'operational' as well as an 'advisory' responsibility. *Id.* at 32. Examples of the types of advisory committees include those which provide: (1) policy advice; (2) technical advice; and (3) fact finding. *Id.* at 33, 37, 39. (Emphasis added.)

38. On information and belief, the NEPDG still is in existence. In a January 3, 2002 letter to Rep. Henry Waxman, Counsel to the Vice President David Addington conceded that an unidentified member of NEPDG's staff had met with Enron representatives on October 10, 2001 and discussed energy policy matters. *See* January 3, 2002 letter from Counsel to the Vice President David Addington to Rep. Henry Waxman, attached as Exhibit 11. On information and belief, other meetings between both federal and non-federal members of the allegedly defunct NEPDG have occurred and are still occurring to this day to continue discussions on formulating a national energy policy. *Id.* Consequently, despite the alleged termination of Defendant NEPDG on September 30, 2001, Plaintiff's FACA and FOIA requests are not moot, and Plaintiff still has a right to the documents it has requested pursuant to the FACA and FOIA.

39. At a February 12, 2002 hearing in this matter, Defendants admitted that, despite the alleged termination of NEPDG, documents generated by the NEPDG are still in the custody of Defendant Cheney and that other NEPDG records "are within all of those eight agencies pertaining to the work of their agency heads, their agency heads' work on the committee." *See* Transcript of February 12, 2002 Motions Hearing at 5-6. Indeed, the Court ordered that these records be preserved. Consequently, despite the alleged termina-

tion of Defendant NEPDG, documents responsive to Plaintiff's FACA and FOIA requests obviously still exist. Plaintiff's FOIA and FACA requests are not moot, and Plaintiff still has a right to the documents it has requested pursuant to the FOIA and FACA.

COUNT I

(Violation of the Federal Advisory Committee Act)

40. Plaintiff incorporates by paragraphs 1-39 as if fully set forth herein.

41. The NEPDG is a federal advisory committee as defined under the FACA, 5 U.S.C. App. 2, and as such is required to comply with all provisions of that law, including, but not limited to, filing a charter, allowing interested persons—such as Plaintiff—to attend and have input at meetings of the NEPDG, producing documents and other things and having open meetings in accordance with the FOIA, 5 U.S.C. § 552, publishing notice of all future meetings in the federal register, and having a board that is fairly balanced in terms of the points of view represented.

42. Plaintiff has made a request to the NEPDG that representatives of Plaintiff be allowed to attend and participate in meetings of the NEPDG, that they be given copies of certain NEPDG documents, and the NEPDG appoint at least one person with a different point of view, among other matters. *See* Exhibit 8.

43. Defendant NEPDG denied Plaintiff's request by letter dated July 5, 2001. *See* Exhibit 9.

44. The failure of Defendants to comply with the FACA has harmed Plaintiff in that Plaintiff has as one of its primary functions the monitoring and safeguarding of the public trust. The activities of the

Defendants in this case have deprived Plaintiff of its right, granted by the FACA, to participate in meetings held by the NEPDG, to have advance notice of those meetings, to obtain documents generated by the NEPDG, and to have a voice in the affairs of the NEPDG. The acts of Defendants have thus frustrated Plaintiff's ability to effectively carry out its purpose of promoting and protecting justice and social welfare, including, among other things, preventing abuse and violation of the public trust by federal officers, officials, employees, agents, and/or persons acting in concert with them.

45. As an interested party and a representative of the public, Plaintiff has been and continues to be damaged by the operations of the NEPDG. Public confidence in the integrity of the Presidency and the executive branch as a whole has been and will be harmed by the appearance that the Vice President and the Bush Administration as a whole are under the influence of a select few members of major oil and other energy producing corporations, many of whom contributed heavily to the Bush-Cheney Administration in the 2000 Presidential election cycle. Members of Defendant NEPDG also gain influence or favor with the executive branch to the detriment of others who do not participate in the NEPDG.

46. Plaintiff will continue to suffer permanent and irreparable injury unless operation of the NEPDG is brought into compliance with the provisions of the FACA.

COUNT II

(Violation of the Freedom of Information Act)

47. Plaintiff incorporates paragraphs 1-46 as if fully set forth herein.

48. Plaintiff filed with Defendant on June 25, 2001 *via* facsimile and on June 26, 2001 *via* certified mail, a FOIA request (*see* Exhibit 8) in the form of a letter to Vice President Richard B. Cheney, requesting access to certain records under FOIA. Access was requested to "copies of all minutes and final decision documents of NEPDG meetings from January 20, 2001 to the present, as well as a listing (including addresses) of all persons and entities that participated in NEPDG meetings, either directly or indirectly through agents and/or intermediaries," among other items.

49. By letter dated July 5, 2001, Defendant Cheney denied Plaintiff's request. *See* Exhibit 9.

50. Pursuant to 5 U.S.C. § 552(a)(6)(C) and 5 U.S.C. § 552(a)(6)(E)(ii)(I), Plaintiff shall be deemed to have exhausted its administrative remedies with respect to its request to Defendant.

51. Pursuant to 5 U.S.C. § 552(a)(3), Plaintiff has a right of access to the information and documents requested in its FOIA request, and Defendants have no legal basis for refusing to disclose this information and these documents to Plaintiff.

COUNT III

(Violation of the Federal Advisory Committee Act/Mandamus)

52. Plaintiff incorporates paragraphs 1-51 as if fully set forth herein.

53. The Cheney Energy Task Force and Task Force Sub-Groups are advisory committees as defined under FACA.

54. The defendants have violated FACA as follows:

a. By failing open each meeting of the Cheney Energy Task Force and Task Force Sub-Groups to the public. (Violation of FACA §10(a)(1)).

b. By failing to publish timely notice of each meeting of the Cheney Energy Task Force and Task Force Sub-Groups in the Federal Register. (Violation of FACA §10(a)(2)).

c. By failing to allow Plaintiff and other interested persons to attend, appear before, or file statements with the Cheney Energy Task Force and the Task Force Sub-Groups. (Violation of FACA §10(a)(3)).

d. By failing to make available for public inspection and copying the records, reports, transcripts, minutes, appendices, working papers, drafts, studies, agenda, or other documents which were made available to or prepared for by the Cheney Energy Task Force and Task Force Sub-Groups. (Violation of FACA §10(b)).

e. By failing to keep detailed minutes of each meeting of the Cheney Energy Task Force and Task Force Sub-Groups, certified as accurate, that contain a record of the persons present, a complete and accurate description of matters discussed and conclusions reached and copies of all reports received, issued, or approved by the Cheney Energy Task Force and Task Force Sub-Groups. (Violation of FACA §10(c)).

f. By establishing the Task Force Sub-Groups without specific authorization by statute or by the

President and without a determination published in the Federal Register, that establishing the Task Force Sub-Groups is in the public interest. (Violation of FACA §9(a)).

g. By allowing the Cheney Energy Task Force and Task Force Sub-Groups to meet and take action without filing an advisory committee charter containing the information required by FACA (Violation of FACA §9(c)).

55. The Defendants have a nondiscretionary duty to comply with the procedural requirements of FACA including but not limited to those set forth in the preceding paragraph as items (a) through (g).

56. This Court has jurisdiction to compel the Defendants to perform a nondiscretionary duty pursuant to the Mandamus and Venue Act, 28 U.S.C. §1361.

COUNT IV

(Violation of the Federal Advisory Committee Act/Administrative Procedure Act)

57. Plaintiff incorporates paragraphs 1-56 as if fully set forth herein.

58. By violating the FACA as set forth in paragraph 54, the agency Defendants have acted arbitrarily and capriciously and not in accordance with law, and without observance of procedure required by law, in violation of 5 U.S.C. §706(2)(A) and §706(2)(D).

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prayers for relief and judgment as follows:

1. That the Court enter a judgment declaring Defendants to be in violation of the FACA and the APA;

2. That the Court enter a writ of mandamus ordering Defendants to comply with the FACA, the FOIA, and the APA;

3. That the Court grant Plaintiff a fee waiver under the FOIA;

4. That the Court enter a permanent injunction prohibiting Defendants from convening, conducting or holding any meeting or engaging in any other activities that are not in full compliance with the FACA, the FOIA, and the APA;

5. That the Court enter a permanent injunction ordering Defendants to provide to Plaintiff, within ten working days and at no cost to Plaintiff, a full and complete copy of all records, reports, transcripts, minutes, appendixes, working papers, drafts, studies, agenda, or other documents which were made available to or prepared for Defendant NEPDG, irrespective of whether any such document otherwise is or could be exempt from disclosure under the FOIA;

6. That the Court enter a permanent injunction ordering Defendants to prepare and deliver to Plaintiff, within ten working days, detailed minutes of each meeting of Defendant NEPDG, certified as accurate, that contain a record of persons present, a complete and accurate description of matters discussed and conclusions reached, and copies of all report received, issued, or approved by Defendant NEPDG; and

7. That the Court award Plaintiff attorneys fees and its costs of suit, as well as any and all other relief the Court deems appropriate.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 28, 2002 a true and correct copy of the foregoing SECOND AMENDED COMPLAINT was served by first class mail, postage prepaid, on the following:

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ATTACHMENT 1

I OF I STORY

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SECTION: NATIONAL AFFAIRS; Pg. 18

LENGTH: 1622 words

HEADLINE: Big Energy at the Table

BYLINE: By Howard Fineman and Michael Isikoff; With Mark Hosenball, T. Trent Gegax and Rich Thomas in Washington

HIGHLIGHT:

Winning support for your agenda is easy when your allies fill out administration's top chairs

BODY:

If you were in the oil and gas business, it was a meeting that dreams were made of. Nine days before George W. Bush was inaugurated, energy lobbyists gathered at the American Petroleum Institutets offices in downtown Washington. Their agenda: to write a wish list. One participant remembers it fondly. "The tone was, 'OK, what do you guys want? You are going to have the ear of this white House'." In came an easel and a whiteboard, and ideas flowed: looser rules for drilling on federal lands; more drilling for oil and gas in Alaska and the Gulf of Mexico; lower royalty payments for tapping offshore wells. After a while, the mood in the room grew giddy. The man from the wildcatters'

association suggested going All the Way. It was time, he said, to rethink the Endangered Species Act.

That was a wish too far. But many items on that board—and other lists scribbled by other energy lobbyists in other offices around town—found their way into the recommendations that the president will unveil to the nation next week. The API list, in fact, was forwarded to George Bush's transition team, which sent it to the Interior Department. On March 20, Interior sent many of the same ideas to the Energy Task Force that Vice President Dick Cheney had convened on Jan. 29. To close the loop, key leaders from that API meeting have since been appointed to pivotal positions in Bush's administration—among them J. Steven Griles, an energy lobbyist and the new second in command at Interior, and Thomas Sansonetti, an energy lawyer recently named the top environmental cop at the Justice Department. The two, in effect, will help administer policies they helped to write.

If the Bush administration is homecoming weekend for the energy industry, Dick Cheney's task-force report is the pregame tailgate party. Not since the rise of the railroads more than a century ago has a single industry placed so many foot soldiers at the top of a new administration. While the report will recommend an array of what one White House aide advertises as "high-tech, 21st-century conservation ideas," its core will be a call to find and use new sources of fossil fuels, as well as a renewed commitment to nuclear power. What voters need to hear "loud and clear," the president declared last week, "is that we are running out of energy in America."

Is there a national "Crisis"? California faces rolling summer-electricity Blackouts. In New York City, officials are scrambling to add small gas-fired generators to handle peak demand. Natural-gas prices have doubled in the past year. The numbers on signs at filling stations are skyrocketing, and could hit $3 a gallon this summer in the Midwest. In a West Wing interview with NEWSWEEK, Cheney shied away from the C word. "I think the potential is there for it to adversely affect the economy," he said.

But voters are using the word. In a NEWSWEEK Poll, 71 percent of those surveyed say there is an "energy crisis" in California; 53 percent agree there now is one in the country as a whole. Given an either-or choice between "protecting the environment" and "developing new sources of energy," those polled selected energy by 52 to 41 percent, compared with a 49-44 ratio just one month ago,

There's something to be said for turning to energy-industry alums in this situation—and Cheney, who like Bush is a son of the oilfields, is not shy about saying it. "The fact of the matter is you get a lot of expertise with people who have been dealing with these issues for a long time," he told NEWSWEEK. In his own case, he said, his time at Halliburton, the globe-girdling oil-services company taught him "a hell of a lot about the technology of the business," such as benign new ways to drill in Alaska's Arctic National Wildlife Refuge.

But Americans are skeptical of industry motives —and, by extension, of Bush's ties. When asked to name who had contributed "a lot" to the current energy situation, those polled named two sets of villains: the U.S. energy companies (66 percent) and overseas energy suppliers, such as OPEC. Bush himself gets his

lowest approval marks for his handling of energy and environmental issues. Democrats, naturally, are pouncing on what they see as a populist hole in Bush's armor. Late last week House Minority Leader Dick Gephardt was stumping in Chula Vista, Calif.; with transmission lines as a backdrop, he vowed to impose new federal caps on electricity rates—an idea Cheney flatly opposes.

The administration may well have raised the political risk via the process it used to draft its plan. The Bushies used a secretive, believers-only process reminiscent of another such enterprise: Hillary Rodham Clinton's effort to write a national health-care plan in 1994. Since the group comprises only government officials, White House aides say, it *is* entitled to keep its deliberations private. Still, industry leaders —who dumped $22.5 million into GOP coffers in the last election—enjoyed constant contact with the task force. Cheney met with a group of utility executives at the Edison Electric Institute, whose president, Tom Kuhn, was a leading Bush fund-raiser. No one has enjoyed better access than Enron CEO Ken Lay, who recently had dinner with his good friend the president.

The environmental community, meanwhile, got one mass meeting with the staff a month ago (and the promise of another this week with EPA Administrator Christine Todd Whitman). Efforts to meet with Cheney were rebuffed. Cheney himself confirmed he had not met with a single spokesman for the greens. That dynamic has only fueled suspicions among enviros about what's going on behind closed doors. "They're drumming up a fake energy crisis that doesn't exist," says Phil Clapp of the National Environmental Trust.

To be sure, the Cheney report will make many nods in the direction of conservation and renewable resources. Cheney confirmed that it will call for tax credits for both. The plan will herald and encourage the advent of less intrusive, high-tech means for finding and extracting oil and gas and for burning more coal. White House spinners have decided to divide the report into five parts—only two of which will deal with the extraction and the transmission of new sources of traditional types of fuel. The conservation measures will be high tech and optimistically can-do about using Yankee ingenuity to give Americans all the cars and appliances they want while using less electricity from state-of-the-art power plants. But there will be no paeans to the kind of pantywaist, tree-hugging self-abnegation the Bushies think President Carter sermonized about a generation ago. "This isn't about not bathing or turning off your lights," said a top Cheney aide. "This is about finding environmentally safe ways to make sure we have the energy we need,"

That's not enough, environmentalists say, given the rising threat of global warming the green community is convinced comes from burning fossil fuels. "The test of any energy plan will she what it does to limit greenhouse gases," says Fred Krupp of Environmental Defense. The Union of Concerned Scientists, concerned about global warming, says that renewables and conservation could displace 20 percent of traditional electricity demand by the year 2020—and greatly lessen the need for new power plants. Cheney thinks otherwise. In that span, he said, reliance on renewables could indeed triple—a "fairly optimistic" scenario but one that would still meet only 6 percent of total electricity needs. But that estimate does not include

imposing tough new mileage standards on SUVs or mandating more efficient appliances. "Part of our task," he said, "is to focus on reality, and reality is not 'Well, gee, we'll conserve our way out, we don't have to produce any more,' or 'Wind and solar will take care of it, so we don't need fossilfuels anymore'."

Now comes the hard part: selling the plan to the public and to Congress. Some GOP strategists are sanguine about overcoming environmental concerns. "Nothing like $3-a-gallon gasoline to help make the case," said one. But it's probably not that simple. White House strategists are looking for clues on how best to hawk the package in polls done for them by the Republican National Committee. The surveys show that voters know very little about where energy supplies come from or how they now are distributed in what has become a relatively deregulated marketplace. "Voters out there think that the government guarantees cheap, abundant energy," said one worried Republican polltaker, "and that's not the way it works anymore." Other insiders worry less about the Democrats than the news media, which they regard as addicted to showing videotape of belching smokestacks. "Bush will have the bully pulpit," says GOP consultant Alex Castellanos, "but it's not an easy sell."

But sell Bush must. He'll take his show on the road next week, joined by a fleet of cabinet secretaries. They will declare that action is needed after years of Clinton-administration neglect. They will say that there are no quick fixes, and tout their market-based, supply-side, long-term answers. They may use real-world vignettes about energy shortages. (on request, the Natural Gas Supply Association provided the White rouse some.) But politics is lived in the short term, and

Bush late last week suddenly found himself in the role of conservation advocate. He ordered federal facilities in California to turn up thermostats, and pledged that they would reduce electricity use by 10 percent. Cheney, the interview over, hurried to the Cabinet Room for the announcement. It turns out that conservation matters a great deal, at least in California, at least for now.

GRAPHIC PHTO: Inner circle Cheney presiding over a meeting of the Energy Task Force last week in the vice president's ceremonial office; PHOTO: The outsider: Clapp claims the Bushies may he ginning up a fake energy crisis; GRAPHIC: (Chart) Energy Advocates in the Bush Pipeline (Graphic omitted)

LOAD-DATE: May 9, 2001

ATTACHMENT 2

Newsweek

A NEW CAPITOL CLASH

Enron continues to roll Washington. Next up: a constitutional showdown

By Howard Fineman and Michael Isikoff
NEWSWEEK

Feb. 11 issue—For security reasons, George W. Bush and Dick Cheney are not supposed to spend much time together. But they made an exception last Tuesday afternoon for a hoary ritual of life in the capital: the briefing of the network anchors. Just hours before Bush's State of the Union address, Peter Jennings, Dan Rather, Tom Brokaw & Co. were ushered into the Old Family Dining Room in the private quarters of the White House to hear the president and his veep spin the speech.

ONE OF THE FIRST questions was about Enron, and Cheney's refusal to turn over logs of his energy task force's secret contacts with energy executives. "Won't this get in the way of the message of the speech?" one of the anchors asked. "Why not just give Congress the information and get it over with?" Before Cheney could answer, Bush cut in. Pounding the table, he insisted that a fundamental right of the presidency was at stake: the ability to get information and private, candid advice from anyone, any time. Bush fully backed Cheney's refusal to comply with the General Accounting Office's demand for the lists. What about the GAO's threat to file a suit? For Bush, it was a Texas Ranger moment. "Bring it on," he said.

David Walker is getting ready to do just that. The GAO chief, who now says he will sue to get the documents, insists he wasn't looking for a showdown with

Cheney. Last summer two House Democrats asked the GAO probe whether the energy task force was unfairly influenced by industry lobbyists. Walker complied, sending the White House a sharply worded "demand letter" requesting all notes and minutes of its meetings.

SCALING BACK

A plain-spoken Republican who worked in Ronald Reagan's Labor Department and later as an Arthur Andersen executive, Walker tells NEWSWEEK he concluded that the demands were too intrusive. "Out of respect for the vice president," Walker says, he "personally" scaled back the request, asking only for a list of people who advised the task force and the topics of their conversations. But Cheney sill refused. Then Enron collapsed late last year, and Walker's cause suddenly became a whole lot more interesting. "This all got Enronized," says one administration aide with a sigh. Walker, who has hired a Washington law firm to handle the case, says his investigation "isn't an Enron issue." Congress, he says, "has the right to know who from the outside is seeking to influence" White House policy. "I'm not seeking a confrontation. We just need the information."

As the trash talk between the two sides escalates–["]Talk is cheap," Walker sneers at Cheney's chin-out attitude–the case has become in part a classic Washington showdown between two powerful, bullheaded men. Yet the feud frames a wider clash between two worlds: a White House with an instinct for secrecy and Washington's Axis of Inquiry–lawyers, journalists, courts and congressional investigators. That clash will only intensify in the coming days, as former Enron CEO Ken Lay heads for the Hill and the Justice Department

proceeds with its criminal probe of the troubled energy company.

The White House has hung tough, but the administration made a limited tactical retreat as pressure increased to fully disclose its ties to Enron. Cheney acknowledged that he had personally discussed energy policy in a March 2001 meeting with Lay–and officials admitted that there were five other meetings between Enron representatives and Cheney's staff. In fact, there was at least one more. NEWSWEEK has learned that on March 29 of last year, Cheney's top energy aide, Andrew Lundquist, met with members of the Clean Power Group–a coalition funded by five power companies that included Enron. The group wanted the task force to replace some environmental rules with a plan that would allow industries to trade "pollution credit" among themselves. Enron stood to make hundreds of millions of dollars if the plan was adopted.

'WHO CARES'?

The meeting was arranged by Brad Card, the Clean Power Group's outside lobbyist and brother of White House chief of staff Andrew Card. So why didn't the White House disclose the meeting in its list of Enron contacts? A White House aide says Lundquist "has no recollection" of being told that Enron was part of the group. (Brad Card's associate Mark Irion tells NEWSWEEK he made clear to Lundquist at the outset that Enron was a member.) Cheney spokeswoman Mary Matalin says its doesn't matter, since the proposal never made it into the energy plan. "Who cares if there were a hundred meetings?" she says. The Justice Department might. On Friday, Justice officials ordered the administration to preserve all documents related "in any way" to Enron.

Democrats, and even some Republicans, on the Hill are standing shoulder to shoulder with Walker's demands for still more disclosure. Their argument: when the White House or government agencies make policy, they are supposed to use a procedure that guarantees public access to keep officials from being secretly influenced by private–so-called ex parte–conversations.

The White House insists that all meetings of the task force are exempt from this kind of disclosure. Why? Because Cheney–a "constitutional officer" as vice president–is exempt, and therefore, they say, so is the task force he ran. White House aides say they designed the task force to avoid the problems that Hillary Clinton's health-care group faced in 1994. To insulate the group within the constitutional limits, aides say, Cheney himself chaired it, only government officials served on it and only task-force members–not the whole group–met with industry lobbyists. Critics complain that's a loophole big enough to drive an oil rig through.

Bush and Cheney are unimpressed. For years Cheney has loudly lamented the steady erosion of presidential power at the hands of Congress and the press. And Bush is the son of a CIA director and third-generation Skull and Bones man: a kid to secrets born. The Cheney-Bush kinship has been strengthened by the war on terror, with its emphasis on sealed lips. "It's a horse race between them," says a top White House aide, "to see who can take a tougher stand."

The president's political advisers aren't nearly so confident. For months GOP strategists have been urging the White House to ease up or risk looking as if it has something to hide. "If we released everything, we would look better," admits one Bush aide. But in his

increasingly tense stare-down with Walker, Cheney isn't about to be the one who blinks first.

With Martha Brant and Tamara Lipper

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ATTACHMENT 3

THE ENRON COLLAPSE
Memo details Cheney-Enron links

THE ENRON COLLAPSE
Memo details Cheney-Enron links
Company's suggestions resembled elements of the administration's energy policy
David Lazarus, chronicle Staff Writer
Wednesday, January 30, 2002
2002 San Francisco Chronicle

URL: http://www.sfgate.com/egi-bin/article.ccgi?file=/chronicle/archive/2002/01/30/MN46204.DTL

MEMO

While the White House insists that details of its talks with Enron officials remain secret, a memo outlining those discussions reveals the extent to which the Houston energy giant lobbied to influence government policy.

The memo, a copy of which was obtained by The Chronicle, was handed by former Enron Chairman Ken Lay to Vice President Dick Cheney last April when the two met to discuss the administration's response to California's energy crisis.

The White House acknowledged last night that aspects of the memo resembled elements of Cheney's energy plan, but it refused to say whether the document was

included in notes that Cheney now refuses to divulge to congressional investigators.

The General Accounting Office is threatening to sue the administration if it doesn't disclose. details of its talks with Enron officials.

The three-page document contains eight points spelling out Enron's case for why federal authorities should refrain from imposing price caps or other measures sought by California officials to stabilize runaway electricity prices.

A number of the positions in the memo subsequently made it into Cheney's energy plan or were reflected in comments by senior administration officials.

"Events in California and in other parts of the country demonstrated that the benefits of competition have yet to be realized and have not yet reached consumers," the memo argues.

"The following actions need to be taken," it continues, outlining positions on a series of matters. Some of the topics, such as equal access to transmission grids and interconnection of power networks, are largely technical in nature.

ENRON FROWNED ON PRICE CAPS

The key point as far as California was concerned was whether soaring wholesale power prices should be limited or whether such prices were merely a reflection of normal supply-and-demand dynamics.

"The administration should reject any attempt to re-regulate wholesale power markets by adopting price caps or returning to archaic methods of determining the cost-base of wholesale power," the memo says.

It adds that even temporary price restrictions "will be detrimental to power markets and will discourage private investment."

The memo blames California officials for having made only "limited progress" in tackling the state's power woes. It says that if the administration were to follow all of Enron's recommendations, the measures "would mitigate this crisis."

An Enron spokesman confirmed that the memo had been given by Lay to Cheney during their one-on-one talks.

Mary Matalin, an adviser to the vice president, said Cheney's energy plan included input from many sources. "Just because some of the things (in the memo) are included in the plan doesn't mean they were from the talks" between Cheney and Lay, she said.

LIMITS CALLED 'A MISTAKE'

Still,, as far as price caps go, the administration was quick to fall into lockstep with Enron's opposition to any federal regulatory moves. "We think that's a mistake," Cheney said just weeks after his meeting with Lay.

Nevertheless, federal regulators finally imposed price limits in June based on the cost of the least-efficient, and thus most expensive, generating plant. Democrats in Washington had threatened to act on their own if the regulators did not come up with a remedy for California's troubles.

Cheney also echoed Enron's position on the culpability of California's leaders in exacerbating the state's energy problems.

"When the problem became obvious last year, over a year ago, they didn't respond," he said in May.

Noting that California had experienced rolling blackouts and the bankruptcy of its biggest utility, he also said, "I don't think that's a sterling record of leadership, I would guess, on their part."

SHARED FAITH IN DEREGULATION

To be sure, Cheney, Lay and President Bush, as well as other industry players, shared a belief in deregulation well before the lights went out in California. But the memo underscores the broad kinship between Enron and the administration in drafting official policy.

Steve Maviglio, a spokesman for Gov. Gray Davis, said it came as no surprise that Enron had substantial clout in formation of the Bush administration's stance on California's difficulties.

"What the federal government did during the energy crisis was pretend that the problem didn't exist and say that the markets can solve everything, and that's the same thing Ken Lay told the governor," Maviglio said.

He added that "the administration was espousing what Enron was espousing—that the markets should fix themselves."

Whatever else, it's extraordinary for a private company, particularly one accused by California officials of having gouged the state with wildly inflated energy prices, to have played such a prominent role in the White House's response to the crisis.

'CONSUMERS SHOULD BE OUTRAGED'

"If the administration was allowing Enron to guide its policy during the California energy crisis, consumers should be outraged," said Janee Briesemeister, senior policy analyst at Consumers Union in Austin, Texas.

"It's not unusual for a company to hand policymakers their ideas for what should be done," she added. "Things break down when policymakers reffuse to admit that they used what was brought to them by industry."

Cheney's argument, as he told an interviewer Sunday, is that revealing details of his talks with Enron would undermine "the ability of the president and the vice president to solicit advice from anybody they want in confidence."

Bush echoed this sentiment a day later, saying that confidential talks are necessary to "get good, sound opinions." He reiterated that stance yesterday in a meeting with congressional leaders.

Craig McDonald, director of Texans for Public Justice, a watchdog group, called it laughable for the administration to cast its secrecy as a defense of high-minded principle.

"All they're fighting for is to keep the wraps on how much clout Enron had over Dick Cheney's energy plan," he said.

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SF Gate: Multimedia (image)

THE ENRON COLLAPSE / Memo details Cheney-Enron links / Company's suggestions resembled elements of the administration's energy policy This memo was given to Vice President Dick Cheney by Enron's then-CEO Ken Lay last April. It spells out Enron's case for why federal authorities should refrain from imposing price caps or other measures sought by California officials to stabilize runaway electricity prices. Image File: 270 Kbytes

National Energy Policy: Priorities

The 1992 Energy Policy Act (EPA) intended to introduce competition into the wholesale market for electric power by providing transmission access. Events in California and in other parts of the country demonstrated that the benefits of competition have yet to be realized and have not yet reached consumers. To realize the vision set forth in the EPA the following actions need to be taken:

1. **Fair Transmission Access**

ln Order No. 888, the FERC attempted to formulate fair terms and conditions of access to the transmission grid for all users. How ever, the FERC failed to extend its jurisdiction to transmission services bundled together with retail sales. Consequently, distinct rules apply to different parties for use of the *same* transmission asset and such rules provide vertically integrated utilities the opportunity to use their transmission assets to disadvantage independent third party generators and wholesalers.

To achieve robust competition in wholesale power markets, the FERC must actively exercise jurisdiction over all aspects of electricity transmission in inerstate commerce and place all uses of the grid under the same rates, terms, and conditions. Moreover, FERC jurisdiction must extend to the terms of access applicable to transmission systems owned and operated by non-FERC jurisdictional entities including Federal Power Marketing Associations (PMAs), states and municipalities.

To improve reliability, the FERC has encouraged utilities to combine transmission facilities into large regional Transmission Organizations (RTOs) and to assign the responsibility for operating RTOs to an indepenent management team. Properly structured RTOs can ease the movement of power between states and between users within a state, and will enhance reliability, commercial activities, and competition in the energy industry.

However, the FERC has refused to make RTO participation mandatory. This, coupled with the lack of non-discriminatory open access terms, has weakened the RTO initiative. Therefore, the Administration must encourage the FERC to approve only those RTOs with sufficient size and scope and with non-discriminatory terms and conditions for access and to require that all transmission owners participate in an RTO. Finally, the Administration should revise those tax provisions that prevent the transfer of assets to new, stand alone independent, for profit transmission companies (Transcos).

2. Independent Energy Reliability Organizations

Governance of the North America Electric Reliability Council (NERC) is cumbersome and places new market entrants at a competitive disadvantage. There is a necessary role for FERC oversight of a new Independent Reliability Organization (IRO).

Legislation to establish a new IRO is required. However, the "consensus" reliability language in the proposed Murkowski bill is ineffective since it establishes an unsatisfactory procedure to resolve conflicts between the IRO and the various RTOs established by the FERC.

Legislation that permits the FERC to delegate authority to develop reliability standards and enforce standards, establishes an appropriate funding mechanism, includes a limited States' savings clause and provides the IRO participants with anti-trust immunity will accomplish the shared goal of establishing an effective IRO.

3. Wholesale Market Price Caps or Cost-Based Wholesale Rates

The Administration should reject any attempt to re-regulate wholesale power markets by adopting price caps or returning to archaic methods of determining the cost-base of wholesale power. Price caps, even if imposed on a temporary basis, will be detrimental to power markets and will discourage private investment by significantly raising political risk. Similarly, a return to cost-based wholesale rates will be extremely difficult to implement and will effectively negate significant investments made by

new market entrants made in reliance on the presence of deregulated wholesale power markets.

4. Interconnection Policy

Competitive generation (including Distributed Generation "DG") and wholesale power markets have been hindered by grid interconnection policies and procedures that restrict new entry. The lack of a uniform and effective interconnection policy creates uncertainty, delay and unnecessary costs in development of new generation capacity and standardized, non-discriminatory interconnection procedures.

5. Federal Transmission and Generation Siting Policy

An efficient and reliable interstate wholesale market requires construction of new transmission and generation facilities. Siting and permitting problems have frustrated construction of new facilities. Consistent with rules for certification of natural gas facilities, granting condemnation rights to private parties that have obtained federal authorization to construct facilities can significantly reduce these problems. In addition, Federal Agencies and Tribunal Governments should streamline the regulatory processes to enable expedited construction and efficient operation of energy infrastructure.

6. Demand Reduction Incentives

The Administration should mandate the creation of a regional demand exchange (implemented by mandatory RTOs) that would allow large consumers to

post bids for the reduction of demand. If implemented expeditiously, such a mechanism can have an immediate impact in reducing demand this summer.

7. California Power Crisis

The political leadership in California has made limited progress in solving its power crisis. All of the above items would mitigate this crisis.

8. Natural Gas Supply Outlook

There are concerns that natural gas supplies may not be adequate to meet market demand. Yet all studies indicate that remaining economically recoverable resources in North America are ample for decades to come. These supplies can be further supplemented by imported liquified natural gas. This will allow natural gas to continue to provide an increasing share of the total energy needs to the U.S.

ATTACHMENT 4

Time, February 11, 2002

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Time

HEADLINE Getting The Ear Of Dick Cheney

BYLINE Michael Weisskopf and Adam Zagorin

Dick Cheney has taken a hard line against the General Accounting Office, refusing its efforts to get information on meetings held by his energy task force. Critics suspect that Cheney is stonewalling to conceal the Administration's links with bankrupt energy giant Enron. But Cheney may be hiding more than that. Several other energy companies had opportunities to influence the Administration's energy policy, with both persuasion and money. A key task-force meeting, sources tell TIME, was held by Cheney in the White House on May 3. Among attendees were two lobbyists for electric utilities: former Montana Governor and now G.O.P. chairman Marc Racicot and former G.O.P. Chairman Haley Barbour. Two weeks later, Cheney's report gave the lobbyists much of what they wanted, including a re-evaluation of a costly clean-air rule, called the new-source review, which requires new pollution controls when power plants are expanded. While he was lobbying for these energy interests, Barbour was also raising at least $ 250,000 for a May 21 G.O.P. gala honoring President Bush. The group of utilities Barbour was representing, led by Southern Co., gave $ 150,000 to the event. The night before the gala, Cheney held a glitzy reception at the vice presidential mansion for hundreds of the fete's sponsors and longtime party donors.

Another company that had entree to the Cheney task force was Peabody Energy, a coal behemoth whose

holding company and top officer have given nearly $ 200,000 to the President and his party since Bush took office, including $ 25,000 for the May gala. Sources say Peabody chairman Irl Engelhardt and other energy executives met in March with two task-force members, Energy Secretary Spencer Abraham and Bush economic adviser Larry Lindsey. Cheney's group also heard in March from officials from the nuclear-energy industry—whose trade association, the Nuclear Energy Institute, contributed $ 100,000 to the Bush event. Both coal and nuclear power got major endorsements in the task-force report.

Racicot, who stopped lobbying after taking over the G.O.P. last month, said he didn't raise funds for the Bush bash. Barbour did not return calls for comment. Cheney spokeswoman Mary Matalin denied any link between task-force access and fund raising, saying the Veep had no idea who was financing the gala.

—By Michael Weisskopf and Adam Zagorin

ATTACHMENT 5

OFFICE OF THE VICE PRESIDENT

WASHINGTON

May 4, 2001

The Honorable W.J. "Billy" Tauzin, Chairman
The Honorable John D. Dingell, Ranking Minority Member
Committee on Energy and Commerce
House of Representatives
Washington, D.C. 20515

The Honorable Dan Burton, Chairman
The Honorable Henry A. Waxman, Ranking Minority Member
Committee on Government Reform
House of Representatives
Washington, DC 20515

Gentlemen:

This is in response to the letter of April 19, 2001 from the ranking minority members of your Committee to Mr. Andrew Lundquist, Executive Director of the National Energy Policy Development Group (NEPDG). The letter sought information regarding compliance with the Federal Advisory Committee Act (FACA) (5 U.S.C. Appx. 2) by the NEPDG. Please be advised that the FACA does not apply to the NEPDG, noting especially that FACA by its own terms does not apply to a group "composed wholly of full-time, or permanent

part-time, officers or employees of the Federal Government."

As a matter of comity between the legislative and executive branches, with due regard for the constitutional separation of power and the rights of Americans to petition their government, and reserving all legal authorities and privileges that may apply, we are pleased to provide the enclosed information, which will enable you to conclude independently that the establishment and activities of the NEPDG are not inconsistent with the FACA.

Sincerely,

/s/ DAVID S. ADDINGTON
DAVID S. ADDINGTON
Counsel to the Vice President

Enclosure as stated.

RESPONSES OF ANDREW LUNDQUIST, EXECUTIVE DIRECTOR FOR THE NATIONAL ENERGY POLICY DEVELOPMENT GROUP TO QUESTIONS FROM THE RANKING MINORITY MEMBERS OF THE HOUSE COMMITTEE ON GOVERNMENT REFORM AND THE HOUSE COMMITTEE ON ENERGY AND COMMERCE

COMMITTEE QUESTION (1): (1) It is our understanding that you are directing a task force charged with examining and formulating energy policy.

RESPONSE (1): The mission of the National Energy Policy Development Group established on January 29, 2001 is to develop a national energy policy designed to help the private sector, and as necessary and appropriate Federal, State and local governments, promote dependable, affordable, and environmentally sound production and distribution of energy. To carry out that mission, the Group gathers information, deliberates and makes recommendations to the President. Ultimately, the Group is to report its recommended national energy policy to the President.

COMMITTEE QUESTION (1)(a): (a) Please provide a complete list of task force members and staff assigned to the task force, identifying the employer of the member or staff. In the case of federal employees, please identify the department or agency for which the member or staff works.

RESPONSE (1)(a): The National Energy Policy Development Group consists of the following officers of the Federal Government: the Vice President, Secretary of the Treasury, Secretary of the Interior, Secretary of Agriculture, Secretary of Commerce, Secretary of Transportation, Secretary

of Energy, Director of the Federal Emergency Management Agency, Administrator of the Environmental Protection Agency, Assistant to the President and Deputy Chief of Staff for Policy, Assistant to the President for Economic Policy, and Assistant to the President for Intergovernmental Affairs. The Vice President may invite the Chairman of the Federal Energy Regulatory Commission to participate. The Vice President may invite the participation of the Secretary of State when the work of the Group involves international affairs and, as appropriate, other officers of the Federal government. The Vice President has invited the Director of the Office of Management and Budget to participate. The Vice President presides at the meetings of the Group and directs its work. The Group is supported by five professionals employed by the Department of Energy and assigned for this purpose to the Office of the Vice President: an Executive Director, a Deputy Director, two Senior Professional Staff Members, and a Professional Staff Member.In addition, an individual appointed as a White House Fellow who is assigned to the Office of the Vice President provides support to the Group.

COMMITTEE QUESTION (1)(b): (b) Please identify any task force members and staff who are not full-time federal employees. In the case of any member or staff who is a part-time federal employee, identify the hours per week that person works for the federal government and when that person began working for the federal government.

RESPONSE (1)(b): The National Energy Policy Development Group consists solely of officers of the Federal Government. The six individuals identified

in Response (1)(a) above who provide support to the Group (hereafter "Group support staff") are all full-time Federal employees. For brief periods the employment status of two of the six individuals (from February 1 through 12, 2001 in the case of the Executive Director, and from February 7 through 12, 2001 in the case of the Deputy Director) was as consultants to the Department of Energy while the Department was processing their entrance-on-duty papers; they had no employer other than the Department of Energy during those brief periods. Please note that the Government officers who are on the departments and agencies who help them with review and drafting of materials and may attend Group meetings with them. Those departments and agencies could advise on the personnel status of those assistants if it were material.

COMMITTEE QUESTION(1)(c): (c) Please identify any task force member or staff who, at the time of any task force meeting, was serving as a contractor to, or temporary full time employee of, the federal government while on leave from non-federal employment. For each member or staff identified, please include the name of that person's non-federal employer.

RESPONSE (1)(c): None of the government officers who compose the National Energy Policy Development Group, nor any of the individuals on the Group's support staff, was at the time of any Group meeting, serving as a contractor to, or temporary full time employee of, the federal government while on leave from non-federal employment.

COMMITTEE QUESTION (2): (2) It is our understanding that the task force has conducted a series of

"stakeholder meetings" on energy policy and legislation at federal facilities over the past few months.

RESPONSE (2): The National Energy Policy Development Group has not held such meetings, Individuals on the Group support staff have met with many individuals who are not Federal employees to gather information relevant to the Group's work, but such meetings do not involve deliberations or any effort to achieve consensus on advice or recommendations. These meetings by the Group's staff were simply forums to collect individual views rather than to bring a collective judgment to bear. The Group's staff held such meetings with a broad representation of people potentially affected by the Group's work, including individuals involved with companies or industries (e.g., in the electricity, telecommunications, coal mining, petroleum, gas, refining, bioenergy, solar energy, nuclear energy, pipeline railroad and automobile manufacturing sectors); environmental, wildlife, and marine advocacy, State and local utility regulation and energy management, research and teaching at universities; research and analysis at policy organizations (i.e., think-tanks); energy consumers, including consumption by businesses and individuals; a major labor union; and about three dozen Members of Congress or their staffs.

COMMITTEE QUESTION (2)(a): (a) Please provide a list of all task force meetings held, including the date and location of each meeting.

RESPONSE (2)(a): The Vice President has convened the National Energy Policy Development Group on the following dates in the year 2001, and all such meetings have been in the White House Complex: January 29, February 9 and 16, March 12 and 19, April 3, 11, and 18, and May 2.

COMMITTEE QUESTION (2)(b): (b) Please describe in detail the purpose of these meetings. For each meeting, please explain if the meeting was conducted in order to obtain advice or recommendations about policy or proposed legislation. Please explain whether each meeting had a fixed agenda and/or a defined purpose.

RESPONSE (2)(b): The National Energy Policy Development Group, consisting only of Government officers, has met at each of its meetings for the purpose carrying out its mission to develop a national energy policy designed to help the private sector, and necessary and appropriate Federal, State and local governments, promote dependable, affordable, and environmentally sound production and distribution of energy. At those meetings, to carry out its assigned mission, the Group has reviewed relevant information, deliberated, and formulated potential recommendations. With regard to meetings with individuals involving the Group's support staff, please see Response (2).

COMMITTEE QUESTION (2)(c): (c) Please describe the outcome of each meeting. Please explain to what extent each meeting resulted in the formulation of specific proposals or recommendations. Please specify to what extent the task force incorporated or adopted any suggestions of advice received at each meeting from non-federal "stakeholders", or to what extent it modified its proposals based on input received from non-federal "stakeholders" at the meeting.

RESPONSE (2)(c): Each of the National Energy Policy Development Group's meetings to date have

advanced its mission as set forth in Response (1). Each of the meetings of the Group's support staff described in Response (2) gathered, in support of the Group's mission, information relevant to the Group's work.

COMMITTEE QUESTION (2)(d): (d) For each task that has occurred to date, please provide a complete accounting of all attendees. Please include the name and employer of each attendee as well as the name of all clients represented by each person for the purpose of any particular task force meeting. Please indicate if any participants received any compensation for their involvement in a meeting or meetings.

RESPONSE (2)(d): The officers of the Government constituting the National Energy Policy Development Group attended the Group's meetings. The Group's support staff attended the Group's meetings. Other employees on the staff of the Vice President attended the Group's meetings. The Government officers who constitute the National Energy Policy Development Group have assistants at their departments and agencies who attended the Group's meetings with them.

COMMITTEE QUESTION (3): (3) The Federal Advisory Committee Act (FACA) defines an advisory committee as "any committee, board, commission, council, conference, panel, task force, or other similar group, or any subcommittee or other subgroup thereof . . . which is . . . established or utilized by one or more agencies, in the interest of obtaining advice or recommendations for . . . one or more agencies or officers of the Federal government . . ." The Act requires that the meetings of such advisory committees be noticed in

advance, open to the general public, and on the record, except under certain limited circumstances.

RESPONSE (3): Section 3(2) of the FACA provides that the term "advisory committee" as used in the FACA excludes "any committee that is composed wholly of full-time, or permanent part-time, officers or employees of the Federal Government." The National Energy Policy Development Group is composed wholly of full-time officers of the Federal Government. Accordingly, the FACA requirements to which Committee Questions (3)(a) through (3)(f) refer do not apply. See also Response (2).

COMMITTEE QUESTION (3)(a): (a) Was advance notice of these task force meetings provided to the general public?

RESPONSE (3)(a): See Response (3).

COMMITTEE QUESTION (3)(b): (b) How many of these task force meetings took place on federal property or involved the attendance of federal personnel?

RESPONSE (3)(b): See Response (3).

COMMITTEE QUESTION (3)(c): (c) Were these meetings open to the general public?

RESPONSE (3)(c): See Response (3).

COMMITTEE QUESTION (3)(d): (d) If these meetings were not open to the general public, why not and under what authority?

RESPONSE (3)(d): See Response (3).

COMMITTEE QUESTION (3)(e): (e) Were any transcripts or detailed minutes of these meetings kept by you or any other attendee or participant?

RESPONSE (3)(e) : See Response (3).

COMMITTEE QUESTION (3)(f): (f) If no transcripts or minutes were kept, please explain why not and under what authority?

RESPONSE (3)(f): See Response (3).

COMMITTEE QUESTION (4): (4) As stated previously, we have been informed that only certain "stakeholders" were invited to participate in these meetings.

RESPONSE (4): The National Energy Policy Development Group has not held such meetings. To support the Group in the performance of its mission, one or more of the individuals on the Group's support staff have met with many individuals who are not Federal employees to gather from them information relevant to the Group's work. The non-Federal employees from whom the Group's support staff has thus far sought information constitute a broad range of sources of information; see Response (2).

COMMITTEE QUESTION (4)(a): (a) Was any executive branch agency or any of its personnel responsible in any way for determining who would or would not be invited to participate in these meetings?

RESPONSE (4)(a): See Response (4).

COMMITTEE QUESTION (4)(b) : (b) Please provide a detailed explanation of the process by which each non-federal participant in these meetings was determine to be a "stakeholder" in energy policy.

RESPONSE (4)(b): See Response (4).

COMMITTEE QUESTION (4)(c): (c) Please provide a detailed explanation of the process by which the task force decided not to meet with any private citizens or groups.

RESPONSE (4)(c): See Response (4).

COMMITTEE QUESTION (4)(d): (d) Was the governor of any state invited to participate in these meeting? If so, which? If not, why not?

RESPONSE (4)(d): See Response (4).

COMMITTEE QUESTION (4)(e): (e) Were any state public utility commissioners invited to participate in these meetings? If so, which? If not, why not?

RESPONSE (4)(e): See Response (4).

COMMITTEE QUESTION (4)(f): (f) Were any representatives of organized labor invited to participate in these meetings? If so, which? If not, why not?

RESPONSE (4)(f): (f) See Response (4).

COMMITTEE QUESTION (4)(g): (g) Were any representatives of consumer advocacy groups invited to participate in these meetings? If so, which? If not, why not?

RESPONSE (4)(g): See Response (4).

COMMITTEE QUESTION 4(h): (h) Was the National Federation of Independent Businesses or any other small business representative invited to participate in these meetings? If not, why not?

RESPONSE (4)(h): See Response (4).

COMMITTEE QUESTION 4(i): (i) Did the Department of Energy notify any Member of Congress about the task force's meetings prior to the first meeting or invite any Member of congressional staff to attend any of the "stakeholder" meetings?

RESPONSE (4)(i): To the best of my knowledge, no such notifications or invitations by the Department

of Energy occurred with regard to any Group support staff meetings with non-Federal employees, nor would the Department of Energy have had a role with regard to such meetings that would have called for the Department of Energy to make such notifications or invitations.

/s/ ANDREW LUNDQUIST Date: 5/4/01
ANDREW LUNDQUIST,
Executive Director
National Energy Policy
Development Group

ATTACHMENT 6

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ABC News -July 25, 2001 Wednesday

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HEADLINE: A Conversation With Dick **Cheney**, **Cheney** discusses his first six months in office

ANCHORS: TED KOPPEL

BODY:
Announcer: July 25th, 2001.

Vice President DICK CHENEY: (From file footage) That I will support and defend the Constitution of the United States.

TED KOPPEL, host:

It's been six months since he became **Vice President** of the United States.

Vice Pres. **CHENEY**: And my doctors tell me that I'm not—not up to the task, I'd be the first one to hang it up. The idea that any member of Congress can demand

from me a list of everybody I meet with—there's been this claim it was done in secret, but it wasn't.

KOPPEL: I'm reminded of what one of your predecessors once famously said about the office of the vice presidency not being worth a bucket of warm spit. Only, I don't think he . . .

Vice Pres. CHENEY: I think you cleaned it up.

KOPPEL: . . . used the word spit.

Tonight, A Conversation With Dick **Cheney**.

Announcer: From ABC News, this is **NIGHTLINE**. Reporting tonight from the White House, Ted Koppel.

KOPPEL: Congressman, White House chief of staff, secretary of defense and, for the past six months, **Vice President** of the United States, Dick **Cheney** is a substantive man in what over the years has sometimes been a largely ceremonial job. If anything, **Vice President Cheney** is occasionally given too much credit when it comes to doing the heavy lifting in this administration. That has focused an extraordinary amount of attention on his health. Is he doing too much? What would happen if he couldn't continue in the job? Tonight he will talk about his health and the public's appetite to know about it in some detail. He will also answer charges that he and other members of the Bush administration wrap the same cloak of secrecy around the creation of their energy policy that Hillary Clinton once used while formulating a new health plan. He doesn't buy the analogy. He'll explain why.

Dick **Cheney** is the man who once rallied Republican supporters by pointing to what he said was an underfunded US military, and promising that help is on the way. Now it is the joint Chiefs and some senior

civilians at the Pentagon complaining about what's in the Bush/**Cheney** military budget. The **Vice President** will talk about a major change in US military strategy. No longer will the United States have the ability to fight two simultaneous wars. All of that and more in a wide-ranging interview with **Vice President Cheney,** conducted earlier today at the executive office building right next to the White House.

You talk about the pros and cons. In other words, the—the—the vice presidency is said to be an enormously frustrating job because you're not the boss.

Vice Pres. **CHENEY:** Mm-hmm.

KOPPEL: This president has given you a lot of authority, given you a lot of power. Talk about the good and the bad.

Vice Pres. **CHENEY:** Well, I—I find it to be virtually all good. I never planned to come back to government. This is my fifth tour, my third time in the White House, and I really thought I'd completed my time in government. And to have the opportunity to come back now at my stage in life, 60 years old, and get to do it one more time, sort of correct all those mistakes you made earlier in your career, is really a . . . (unintelligible).

KOPPEL: Making policy.

Vice Pres. **CHENEY:** And a chance to pol—participate in a policy-making process, he has given me a lot of responsibility. We function very much as a team, which is exactly what he said he wanted when I signed on.

KOPPEL: You've made reference to the enormous amount of experience that you bring to this job. So, I have to ask you, as someone who knows Washington as well as you do, and who knows that the one thing that

drives Congress crazy, the one thing that drives the press crazy, the one thing that is always going to be trouble is secrecy.

Vice Pres. **CHENEY:** Mm-hmm.

KOPPEL: Well, why did you run your—your energy study, your energy meetings the way that you did? Why to this day haven't you revealed who participated in those meetings and what they had to tell you?

Vice Pres. **CHENEY:** Well, that's simply not accurate, Ted. There's been this charge that it was run in secret. But it was run the same way we do everything else with respect to policy. Same way we make economic policy or education policy. It was a group of Cabinet officials and agency heads. This is the report we produced. We published thousands of them. It has not been secret. The folks that were responsible for putting it together are all listed right up here in the front. It's the Cabinet and the agency heads . . .

KOPPEL: What about the experts that you consulted? I mean, you—you know . . .

Vice Pres. **CHENEY:** But we didn't—I mean, there's—there was this allegation that somehow we did what the Clintons did back in '93 on health. We did not.

KOPPEL: Exactly.

Vice Pres. **CHENEY:** We were very sensitive to that and very careful of it. When you . . .

KOPPEL: Tell me where the—tell me where the difference is?

Vice Pres. **CHENEY:** Well, the—it's when you bring in . . .

KOPPEL: What was different about what you did and what Hillary Clinton . . .

Vice Pres. **CHENEY:** . . . outsiders and incorporate them in the policy-making process, that then certain requirements with respect to federal advisory committees kicks in and certain requirements have to be met. We didn't do that. We did this exactly the same way, for example, that we put together the economic policy or tax policy. And there's been this claim that it was done in secret, but it wasn't. It wasn't anymore secret than anything else we do.

KOPPEL: The inference that people have drawn—but, before I get to that, let me just ask you, what—what is different about what Hillary Clinton did with the health program from what you folks did with the energy policy?

Vice Pres. **CHENEY:** She brought in outsiders, people who were not government employees, who were not full-time . . .

KOPPEL: You didn't do that?

Vice Pres. **CHENEY:** No.

KOPPEL: No outsiders?

Vice Pres. **CHENEY:** Well, not as part of the deliberating pro—process.

KOPPEL: Well . . .

Vice Pres. **CHENEY:** No, that's very important.

KOPPEL: . . . are you finessing that just a little bit too finely?

Vice Pres. **CHENEY:** No. No, you're mis—misreading what the statute says. There's a big difference. We meet all the time behind closed doors to make economic

policy or to make education policy. Now, you may deal with outside groups. They may have points of view they want to represent. We heard from energy people. We heard from many environment people. We heard from consumer groups. I met with congressman and senators and governors. We heard from a broad variety of folks out there, but they were not in the meetings where we put together the policy and made recommendations to the president. That's the big difference.

KOPPEL: Isn't—isn't that a fine point?

Vice Pres. **CHENEY:** That's a very important point.

KOPPEL: In other words, if we—if we have one meeting here . . .

Vice Pres. **CHENEY:** Mm-hmm.

KOPPEL: . . . with a bunch of people, and because of your background and the president's background in the energy industry yourselves . . .

Vice Pres. **CHENEY:** Mm-hmm.

KOPPEL: . . . the assumption is that you did consult with a lot of your pals in the—in the energy industry. If you consult with them in this room, and then you adjourn to the next room to make policy, that—that . . .

Vice Pres. **CHENEY:** That's not the way it works.

KOPPEL: That satisfies the law?

Vice Pres. **CHENEY:** That is—that is not the way it worked. In fact, we heard from a wide variety of different groups. But we did not trigger the statute that specifically provides for how you deal with advisory committees, for formally constituted advisory

committee that's making policy, like the Social Security Commission, for example. There's a classic example of a group of outside people, not full-time government employees, who are meeting to deliberate and to come up with a policy recommendation. They meet in open session. The press is present. You don't do that when you sit down, for example, with the—the secretary of the treasury and the Council of Economic Advisers and director of OMB to make major budget decisions or make . . .

KOPPEL: But why not just take the wind out of the sails of all your critics and say, 'Here's a list of the people we consulted'?

Vice Pres. **CHENEY:** Well, there's—there's an—there isn't anybody we met with there that would be at all surprising. But there's an important principle here, I think, Ted, and that's the fact that what we have is a request from a congressman for a list of all the people we met with, not just in terms of the energy or everybody I met with, for example, during that period of time, as well as what they talked to me about. In effect, what we're saying here, if in fact we were to respond to that request, is that any member of Congress can demand to know who I meet with, what I talk to them about on a daily basis. I would have no ability to meet with anybody in confidence.

KOPPEL: So, on a—on a matter of principle then you are not going to—you're not going to reveal that list.

Vice Pres. **CHENEY:** I think it's going to have to be resolved in court, and I think that's perfectly appropriate. I think, in fact, this is the first time the GAO has ever issued a so called demand letter to a president/**vice president**. I'm a duly elected consti-

tutional office. The idea that any member of Congress can demand from me a list of everybody I meet with and what they say to me strikes me as—as inappropriate, and not in keeping with the Constitution . . . (unintelligible).

KOPPEL: You're saying—you're saying to Congressman Waxman, then, 'See you in federal court.'

Vice Pres. **CHENEY:** I think that's—may well be how it gets resolved, unless he decides he wants to back off. We, in fact, have responded to a lot of what they requested. We've given them financial records, how we spent money. We thinks that's an appropriate question for the GAO to ask. And, as I say, none of this is secret. These are the 105 recommendations, the product of the task force is all right here. All of that's been public. So, we've complied to a large extent. But this request that in fact we're suppose to provide him with this information with respect to people we consult with or people who come see us., as well as give him information on what was said and those meetings in the executive branch between the **vice president** and other individuals strikes me as—as inappropriate, and we think he's out of line in making that request.

KOPPEL: We've got to take short break. A related question on OPEC when we come back.

Vice Pres. **CHENEY:** Yeah.

KOPPEL: Back with **Vice President Cheney** in just a moment.

Announcer: This is ABC News: **NIGHTLINE**, brought to you by . . .

(Commercial break)

KOPPEL: We are, I've just been informed, in the ceremonial office of the **vice president.** Thank you for having us here. Here with **Vice President Dick Cheney.**

We've been talking about energy policy. So I guess it's appropriate to ask you about OPEC's apparent intent to cut production by one million barrels a day in September. That's going to be problematic, isn't it? I mean, you know, just as we see the price of gasoline going down, just as it looks as though the energy crisis was not as severe, at least in the immediate sense as we may have thought, here comes OPEC and—and the president was indicating he's not happy about it.

Vice Pres. **CHENEY:** Well, what the president said is that the key force is to avoid price spikes. If you get a big run-up in fuel prices, that clearly could adversely effect the American economy. That'll adversely effect the global economy. What's really in our interest as consumers, as well as in the interest as suppliers, is stability over time. When you get these sharp swings in prices everybody may say hurrah if oil goes down to $10 a barrel again, but what happens when that occurs is you drive out a lot of marginal production, which is in the US, shut it in. You lose that, become more dependent on foreign sources. Plus, you also lose the investment that would otherwise occur in non-OPEC sources overseas. And when we get these rapid run-downs in price, it really isn't in anybody's interest. It's always followed eventually by a—you know, if it hits $10, it's only a matter of months before we're back up to 30 or 35.

KOPPEL: Particularly in this community, perception of reality is often more important than objective reality itself. Perception is that you folks are a little hard on the environment. Perception is that you were—you

were late to the mantra of saving energy rather than new energy production.

Vice Pres. **CHENEY:** Mm-hmm.

KOPPEL: I know you claim you've—you've always been an advocate of that. But, again, that's not the way you've been perceived. Your mistake? Our mistake?

Vice Pres. **CHENEY:** Well, I would argue, first of all, that we've been very sensitive right along to the environment and to the need for conservation and renewables. If you look at our report, virtually all of the financial incentives, for example, that we've recommended to the Congress, involve conservation and renewables. We don't have any big financial package in there for conventional production. When we put the report together we right up front made a decision the very first meeting, we had to spend a lot of time on those issues or we wouldn't have a credible report. And we've never changed that.

Now the critics, including The New York Times, for example, editorialized against the report before they ever saw it, have made the allegation that all we care about is production and supply. And that's just not true. We have made the point repeatedly that conservation doesn't close the gap. It doesn't get us there, but it's a very important part of our overall strategy. It's one of the reasons we've gotten to where we are. As a country, we've significantly increased our energy efficiency over the years. And the charge, frankly, isn't true, but it often times it gets picked up and carried, sometimes by the press, and as well as used by our opponents as a way to attack the report.

But the report, just to give you a for instance, Ted, out of 12 recommendations the Sierra Club came up with

not long ago on energy, in their own energy plan, 11 of them are in our report. So the notion that somehow we've created a report here that is anti-environment, you'd have to say, 'Well, the Sierra Club is anti-environment, too.' And it's just not true.

KOPPEL: Let's talk about military budget for a moment. And you have been criticized by one of the most conservative magazines in town, indeed the Weekly Standard.

Vice Pres. **CHENEY:** Mm-hmm.

KOPPEL: You probably read the—the editorial. The Weekly Standard is suggesting to the secretary of defense and his deputy, Paul Wolfowitz, they may want to step down, because what you guys, you and the president, are doing to the military budget is a far cry from that clarion cry of Dick **Cheney** during the campaign, "Help is on the way." They're saying, in point of fact, help is not on the way. You guys are gutting the military budget.

Vice Pres. **CHENEY:** They're wrong. And the man who wrote the editorial was not a supporter of ours in the campaign, anyway. There are big changes that are needed in the military. And it was mistreated, I think, for the last eight years during the Clinton administration. We're still very much saddled with the old Cold War force, and there has not been any new investment in new capabilities moving forward. What Don Rumsfeld has been asked to do, and I think he has a good start on, is putting together a military that makes sense for the 21st century. That'll mean a new strategy, a new set of assumptions about what we need to defend against, and what the threats are out there and what our priorities ought to be in terms of spending.

KOPPEL: Don Rumsfeld came to you asking for a $35 billion increase. He got 18.

Vice Pres. **CHENEY:** I don't know a Cabinet member who wouldn't like to have more money in their budget, but he got more than 18. He got 18 in this most recent go around, but we provided a supplemental in '01 of . . .

KOPPEL: Of five.

Vice Pres. **CHENEY:** . . . almost 5.6 billion, particular.

KOPPEL: But of the initial increase . . .

Vice Pres. **CHENEY:** We have provided an increase, as well, to cover inflation. And we put in extra money that the president pledged over and above the 18 during the course of the campaign for military pay. And all of that's been—been folded in. Now, we'd like to do more, but it's the biggest percentage increase in the defense budget since about 1985.

KOPPEL: If, in fact, you guys are going to be spending 50, 100, 200, who knows, maybe as high as $500 billion on the—the defense initiative, the . . . .

Vice Pres. **CHENEY:** Ballistic missile defense.

KOPPEL: . . . ballistic missile defense initiative, the money has got to come out of somewhere, doesn't it?

Vice Pres. **CHENEY:** Mm-hmm.

KOPPEL: Where is it going to come from?

Vice Pres. **CHENEY:** Well, we need to do a much better job of managing the Defense Department. It's become very, very hard to run the Defense Department these days. When I was secretary 10 years ago, the defense authorization bill was 70 pages long. Today it's 900 pages long. These are earmarks, red tape requirements

that the Congress has loaded over the years onto the Defense Department, forces you to keep bases open you don't need, to operate installations at inefficient levels, 40 or 50 percent of capacity, to buy things you don't need, to buy equipment at the least efficient rate, instead of going out and buying what you need.

KOPPEL: We've got to take a short break. When we come back, I want to talk to you about the—the two war premise that has always existed . . .

Vice Pres. **CHENEY:** OK.

KOPPEL: . . . over the past 40 or 50 years. Back with the **vice president** in just a moment.

(commercial break)

KOPPEL: And we're back for our final segment with the **vice president** of the United States, Dick **Cheney**.

Mr. **Cheney** we were talking before, very briefly, about the—the two war scenario. The premise ever since the Cold War and before has been that the United States military has got to be capable of simultaneously fighting wars in two different theaters. Do you still subscribe to that?

Vice Pres. **CHENEY:** Well, the—the assumption that's out there now is one I put in when I was secretary of defense. When the Cold War ended, we went from the posture of having the forces in place to fight an all-out global conflict with the Soviet that could go nuclear. When the Soviet Union went away, we then moved to this two major theater contingency, based upon the notion, for example, of defending in the Gulf—Persian Gulf and simultaneously Korea.

KOPPEL: Korea.

Vice Pres. **CHENEY:** I think now we can afford to change that, but that's a question that Don Rumsfeld has been asked to look at and spend a lot of time on. But I think we're today in a—in a radically different situation with respect to—to world threat situation. I think . . . for example, one of the things we need to focus more on today than we have in the past is this notion of homeland defense. It's hard, if you took out around the globe, to find a nation out there today that can mount a significant conventional assault against the United States or our forces. There are few places that are sensitive, obviously, but nothing like what we faced all those years of the Cold War, or even when we were dealing with Saddam Hussein in the Gulf.

KOPPEL: Let me use the last couple of minutes that we have together to bring you back to this notion of nothing drives Washington crazier than secrecy. No one can argue that the—the individual, the man, Dick **Cheney**, has a right to keep what's between him and his doctor private. But you're the **vice president** of the United States. People would like to know what medicines you're on. People would like to know what you're EKG rate is. People would like to know—there's a lot of stuff people would like to know, and you're saying, in effect, 'Yeah, you'd like to know it, but I'm not going to tell you.' Why?

Vice Pres. **CHENEY:** Well, I would argue, Ted, that we have provided an enormous amount of information. I can't—when I get a head cold that's—that's news. I go to the grocery store, what I buy is in the newspapers. If I go to the restaurant, what I eat shows up in the Reliable Source column in The Washington Post,

KOPPEL: That's because you're **vice president** of the United States.

Vice Pres. **CHENEY**: Well. . . .

KOPPEL: We—we—we think we have a claim to your private life.

Vice Pres. **CHENEY**: My—that's right, and my doctors have on at least three occasions given extensive press briefings. The most recent when I went in and had a pacemaker defibrillator implanted here a few weeks ago. They stood up and answered questions for a very long time afterwards, from the most aggressive folks in the press corp, talking exactly about my case and my circumstance, my situation. I'm probably the best known heart patient in America. I think we've provided a vast amount of information.

KOPPEL: Then why not provide the rest?

Vice Pres. **CHENEY**: Well, I think we've provided virtually everything? What does he want to know, my cholesterol level? It's 170.

KOPPEL: Well . . .

Vice Pres. **CHENEY**: You know, my pulse rate is perfectly normal. My blood pressure perfectly normal, 88 over 120.

KOPPEL: And what—what medications are you on?

Vice Pres. **CHENEY**: I'm on a wide variety of traditional heart medications.

KOPPEL: Do you ever, when you're coming to work,. do you ever feel, 'I'm pushing this a little hard.'

Vice Pres. **CHENEY**: That I'm pushing it hard?

KOPPEL: Yeah, that you're—I mean . . .

Vice Pres. **CHENEY**: No, I'm—Ted, this may be a big deal for you or for others who are watching, but I've

lived with this for well over 20 years, since 1978, and I, you know, I'm used to it. I pace myself. I take care of myself. I do those things I need to do. But, I have—say we have provided a vast amount of information to people. If I ever reach a point where I can't do the job or my doctors tell me that I'm not—not up to the task, I'll be the first one to hang it up. I don't need the grief. But I am here to do a job for the president. I think I am able to do it perfectly acceptably, that there's no reason in this day and age why somebody with coronary artery disease can't live a perfectly normal life, and I think I'm proof positive of that.

KOPPEL: You took as though you've lost a little weight, have you?

Vice Pres. **CHENEY**: I have. I have.

KOPPEL: All right, how much weight have you lost?

Vice Pres. **CHENEY**: Over 20 pounds.

KOPPEL: Good for you. In the area of information that some people would like to have, Senator Lieberman would like to have some information from you and he's threatening to throw out a few subpoenas. Do you got any thoughts on that?

Vice Pres. **CHENEY**: He's, I guess, issued subpoena threats to some federal agencies in recent days.

KOPPEL: Right.

Vice Pres. **CHENEY**: You know, I look at that, I think the departments and agencies have been very forthcoming. I think we're back, sort of, the witch hunt mode now in Washington. We're working hard to try to change the tone and what we see there, I think, is—it's politics, as usual.

KOPPEL: You realize, of course, the Democrats would say, 'Wait a second, witch hunt mode? You—you guys. . .'

Vice Pres. **CHENEY:** Well . . .

KOPPEL: '. . . were the ones who were throwing out subpoenas last time around.'

Vice Pres. **CHENEY:** Well, let's—let's look at it, though. The subpoenas that, in fact, the Republicans went after, there were very serious allegation of campaign finance wrongdoing. There were serious other problems, which we won't enumerate tonight. I'm sure your show covered them adequately when they were—were hot. But there were serious questions about possibility of illicit or improper conduct that the Congress was legitimately looking at. There's no such allegation here now. There hasn't been any such allegation, and, in fact, the administration has cooperated. We've provided a great deal of information to—to, the Congress and will continue to do so.

KOPPEL: Mr. **Vice President**, we're out of time. I thank you for your hospitality. Thank you for talking to me and hope to see you again soon.

Vice Pres, **CHENEY:** Thank you, Ted.

KOPPEL: I'll be back in a moment.

Announcer: To receive a daily e-mail announcement about each evening's **NIGHTLINE** and a preview of special broadcasts, logon to the **NIGHTLINE** page at abcnews.com.

(commercial break)

KOPPEL: And that's our report for tonight. I'm Ted Koppel at the White House. For all of us here at ABC News, good night.

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ATTACHMENT 7

[SEAL OMITTED]

GAO **Comptroller General**

Accountability* Integrity * Reliability **Of the United States**

United States General Accounting Office
Washington, DC 20548

Decision of the Comptroller General Concerning
NEPDG Litigation

January 30, 2002

As you know, the United States General Accounting Office (GAO) has been engaged in an ongoing effort to obtain certain narrowly defined, factual information concerning the development of the National Energy Policy proposal from Vice President Cheney in his role as Chair of the National Energy Policy Development Group (NEPDG). Importantly, we are only seeking limited information in connection with NEPDG-related matters.

The administration used the NEPDG as a mechanism to, among other things, outreach to selected non-governmental parties and develop a proposed comprehensive energy policy. In addition, contrary to recent assertions, we are not seeking the minutes of these meetings or related notes of the Vice President's staff. This was conveyed to the White House in writing on August 17, 2001. Unfortunately, despite our numerous attempts to reach a reasoned and reasonable accommodation on this matter, to date, the information we requested has not been made available to us.

In his August 2, 2001, letter to both Houses of Congress, the Vice President raised a number of objections to providing the information we requested.

Importantly, for both the Congress and GAO, the Vice President challenged GAO's fundamental statutory authority to assist the Congress in connection with its constitutional, legislative and oversight authorities. These challenges went far beyond issues relating to his constitutional position as Vice President and White House staff related matters. As noted in our prior correspondence concerning this matter, the information we are seeking is clearly within our statutory audit and access authority. Accordingly, as provided in our statutory access authority, on July 18, 2001, we issued a formal request for the records, Unfortunately, the statutory 20-day response period passed without any meaningful action by the Office of the Vice President. In accordance with the prescribed statutory process, on August 17, 2001, we reported to the Congress, the President, the Vice President, and other officials that the NEPDG had not provided the requested records. (See enclosed August 17, 2001, report.) While the NEPDG did provide some cost-related documents to GAO, most of these documents were not useful or self-explanatory. Moreover, even though the Vice President and his counsel acknowledge our authority to access cost information, they have not provided us the remaining cost information and explanations requested. Apart from information concerning the Vice President's meetings, they also have not provided us with factual information concerning who the NEPDG staff, including non-White House staff who were assigned to the NEPDG from various government departments and agencies, met with and the purpose of those meetings.

We strongly disagree with the Vice President's objections to our audit and access authority. Significantly, under GAO's statutory access authority, Congress

provided the President and the Director of the Office of Management and Budget a safety valve to preclude judicial enforcement of GAO's access rights. The executive branch has chosen not to use this mechanism. Furthermore, the President has not claimed executive privilege in connection with our request. As previously noted, all of our attempts to reach a reasoned and reasonable accommodation, including reducing the scope of our request, have been rebuffed, and we have now exhausted the statutory process for resolving our access requests. As a result, our only remaining recourse is either to file suit in the United States District Court for the District of Columbia or to forego further assertion of our access rights.

GAO was preparing to go to court in September of this past year until the tragic events of September 11. As I stated last September, prudence dictated that we delay any related legal action given the immediate need for the administration and the Congress to focus on developing our Nation's initial response to our fight against international terrorism and efforts to protect our homeland.

The Congress has a right to the information we are seeking in connection with its consideration of comprehensive energy legislation and its ongoing oversight activities. Energy policy is an important economic and environmental matter with significant domestic and international implications. It affects the lives of each and every American How it is formulated has understandably been a longstanding interest of the Congress. In addition, the recent bankruptcy of Enron has served to increase congressional interest in energy policy, in general, and NEPDG activities, in particular. This, plus the Senate's expected consideration of comprehensive

energy legislation this session, reinforces the need for the information we requested concerning the development of the National Energy Policy proposal. In this regard, we recently received a request for the NEPDG information we are seeking from four Senate committee and subcommittee chairmen with jurisdiction over the matters involved. Importantly, our governing statute requires GAO to perform such committee requests.

Clearly, the formulation and oversight of energy policy and the investigation of Enron-related activities represent important institutional prerogatives of the Congress. Furthermore, a number of other important principles are involved. Failure to provide the information we are seeking serves to undercut the important principles of transparency and accountability in government. These principles are important elements of a democracy. They represent basic principles of "good government" that transcend administrations, partisan politics, and the issues of the moment. As such, they should be vigorously defended. Otherwise, it could erode public confidence in and respect for the institutions of government.

The disclosure of the activities of the NEPDG is also important for precedential reasons. Specifically, the NEPDG was financed with appropriated funds and staffed largely by government department and agency personnel assigned to it. We disagree with the White House position that the formation of energy policy by the NEPDG is beyond congressional oversight and GAO review. Were the Vice President's arguments in this case to prevail, any administration seeking to insulate its activities from oversight and public scrutiny could do so simply by assigning those activities to the

Vice President or a body under the White House's direct control.

In our view, failure to pursue this matter could lead to a pattern of records access denials that would significantly undercut GAO's ability to assist Congress in exercising its legislative and oversight authorities. We would have strongly preferred to avoid litigation in connection with this matter, but given the request by the four Senate committee and subcommittee chairmen, our rights to this information and the important principles and precedents involved, GAO will take the steps necessary to file suit in United States District Court in order to obtain, from the Chair of the NEPDG, the information outlined in our August 17, 2001, report. This will be the first time that GAO has filed suit to enforce our access rights against a federal official. We hope it is the last time that we will have to do so.

We have great confidence in our nation's legal system and look for a timely resolution of this important matter. If you have any questions, comments or concerns, please do not hesitate to contact me.

Sincerely yours,

[signed]

David M. Walker
Comptroller General
of the United States

cc: President of the United States

Vice President of the United States

Enclosure

ATTACHMENT 8

[SEAL]

Judicial Watch
Because no one is above the law.

June 25, 2001

BY CERTIFIED MAIL & FAX

The Honorable Richard B. Cheney
Vice President of the United States of America
Eisenhower Executive Office Building
Washington, DC 20501

Re National Energy Policy Development Group,
A *De Facto* Federal Advisory Committee

Dear Mr. Vice President:

Judicial Watch, Inc., (hereinafter "Judicial Watch"), is a non-profit, public interest law firm that investigates and prosecutes government abuse and corruption.

Recent press reports have detailed the operations and staffing of the National Energy Policy Development Group, (hereinafter, "NEPDG")*. It is clear, based on the political appointments of energy lobbyists and attorneys to senior departmental positions within the government by the Administration, official statements by Administration spokesmen, press reports

* Fineman, Howard and Isikoff, Michael; "Big Energy at the Table; Winning Support for Your Agenda Is Easy When Your Allies Fill Out the Administration's Top Chairs," Newsweek Magazine, May 14, 2001, (Attached).

concerning the activities of energy industry lobbying organizations, as well as other documentation obtained under the Freedom of Information Act (hereinafter, "FOIA"), that the NEPDG is tantamount to a federal advisory committee (hereinafter, "the Committee") as defined in the Federal Advisory Committee Act (hereinafter, "FACA"). 5 U,S.C. App. 2. As such, the NEPDG must file a charter, must allow input from interested persons, must comply with the FOIA and the Government in the Sunshine Act, must publish notice of its meetings in the Federal Register, and must have a board that is fairly balanced in terms of the points of view represented on the Committee, among other requirements of FACA. *See generally* 5 U.S.C. App. 2.

Our specific concerns are illustrated by the appointment of key American Petroleum Institute, (including other energy trade organizations) lobbyists, attorneys, and leaders, such as J. Steven Griles and Thomas Sansonetti, to senior Administration posts with authority bearing directly on the energy policies they represented in a private business capacity. Given the unfortunate ethical history of recent memory concerning conflicts of interest in The White House, Judicial Watch believes it is in the pubic interest for the Administration to avoid even an appearance of possible conflict of interests.

Judicial Watch respectfully requests that, in light of the questionable legal and ethical practices, negative publicity, and public outrage surrounding Hillary Rodham Clinton's 1994 national health-care policy development group, you direct the NEPDG to abide by the FACA. The NEPDG's re-constitution under the provisions of the FACA will instill public trust and confi-

dence in the operations of the Committee, and insure that national policy is formulated, discussed and acted upon in a manner consistent with the best traditions of our Constitutional Republic.

As a public interest law firm, educational foundation and member of the media, Judicial Watch encourages open, accountable government. We trust that you support the same principles, wherever practicable, in the operations of all three branches of government. Certainly, national energy policy is a matter all Americans are keenly interested in, and it is in the public interest for our public servants to engage in an open dialogue and exchange of ideas and options. One positive step toward that goal would be your acknowledgement of the NEPDG as a *de facto* advisory committee under the FACA, and to bring its operations into compliance with all appropriate laws and regulations.

Consistent with our assertion that the NEPDG is a Committee under the FACA, Judicial Watch respectfully requests, under the provisions of the FOIA, 5 U.S.C. 552, and its regulations, copies of all minutes and final decision documents of NEPDG meetings from January 20, 2001 to the present, as well as a listing (including address) of all persons and entities that participated in NEPDG meetings, either directly or indirectly through agents and/or intermediaries. Thank you for your expected cooperation in responding to our request, which should be within 10 working days pursuant to the expeditious handling provisions of the FOIA (see 5 U.S.C. § 551(a)(6)(C) and 5 U.S.C. 552(a)(6)(E)(ii)(I)). Additionally, Judicial Watch seeks to attend all future meetings of the NEPDG Committee. Please furnish Judicial Watch with future

meeting schedules and contact information so our representatives may attend.

Thank you for your cooperation and prompt response.

Sincerely,

Judicial Watch, Inc.

/s/ LARRY KLAYMAN
LARRY KLAYMAN
Chairman and General Counsel

/s/ THOMAS FITTON
THOMAS FITTON

I OF I STORY

Copyright 2001 Newsweek

Newsweek

May 14, 2001, U.S. Edition

SECTION: NATIONAL AFFAIRS; Pg. 18

LENGTH: 1622 words

HEADLINE: Big Energy at the Table

BYLINE: By Howard Fineman and Michael Isikoff; With Mark Hosenball, T. Trent Gegax and Rich Thomas in Washington

HIGHLIGHT:

Winning support for your agenda is easy when your allies fill out administration's top chairs

BODY:

If you were in the oil and gas business, it was a meeting that dreams were made of. Nine days before George W. Bush was inaugurated, energy lobbyists gathered at the American Petroleum Institutets offices in downtown Washington. Their agenda: to write a wish list. One participant remembers it fondly. "The tone was, 'OK, what do you guys want? You are going to have the ear of this white House'." In came an easel and a whiteboard, and ideas flowed: looser rules for drilling on federal lands; more drilling for oil and gas in Alaska and the Gulf of Mexico; lower royalty payments for tapping offshore wells. After a while, the mood in the room grew giddy. The man from the wildcatters'

association suggested going All the Way. It was time, he said, to rethink the Endangered Species Act.

That was a wish too far. But many items on that board—and other lists scribbled by other energy lobbyists in other offices around town—found their way into the recommendations that the president will unveil to the nation next week. The API list, in fact, was forwarded to George Bush's transition team, which sent it to the Interior Department. On March 20, Interior sent many of the same ideas to the Energy Task Force that Vice President Dick Cheney had convened on Jan. 29. To close the loop, key leaders from that API meeting have since been appointed to pivotal positions in Bush's administration—among them J. Steven Griles, an energy lobbyist and the new second in command at Interior, and Thomas Sansonetti, an energy lawyer recently named the top environmental cop at the Justice Department. The two, in effect, will help administer policies they helped to write.

If the Bush administration is homecoming weekend for the energy industry, Dick Cheney's task-force report is the pregame tailgate party. Not since the rise of the railroads more than a century ago has a single industry placed so many foot soldiers at the top of a new administration. While the report will recommend an array of what one White House aide advertises as "high-tech, 21st-century conservation ideas," its core will be a call to find and use new sources of fossil fuels, as well as a renewed commitment to nuclear power. What voters need to hear "loud and clear," the president declared last week, "is that we are running out of energy in America."

Is there a national "Crisis"? California faces rolling summer-electricity Blackouts. In New York City, officials are scrambling to add small gas-fired generators to handle peak demand. Natural-gas prices have doubled in the past year. The numbers on signs at filling stations are skyrocketing, and could hit $3 a gallon this summer in the Midwest. In a West Wing interview with NEWSWEEK, Cheney shied away from the C word. "I think the potential is there for it to adversely affect the economy," he said.

But voters are using the word. In a NEWSWEEK Poll, 71 percent of those surveyed say there is an "energy crisis" in California; 53 percent agree there now is one in the country as a whole. Given an either-or choice between "protecting the environment" and "developing new sources of energy," those polled selected energy by 52 to 41 percent, compared with a 49-44 ratio just one month ago,

There's something to be said for turning to energy-industry alums in this situation—and Cheney, who like Bush is a son of the oilfields, is not shy about saying it. "The fact of the matter is you get a lot of expertise with people who have been dealing with these issues for a long time," he told NEWSWEEK. In his own case, he said, his time at Halliburton, the globe-girdling oil-services company taught him "a hell of a lot about the technology of the business," such as benign new ways to drill in Alaska's Arctic National Wildlife Refuge.

But Americans are skeptical of industry motives —and, by extension, of Bush's ties. When asked to name who had contributed "a lot" to the current energy situation, those polled named two sets of villains: the U.S. energy companies (66 percent) and overseas energy suppliers, such as OPEC. Bush himself gets his

lowest approval marks for his handling of energy and environmental issues. Democrats, naturally, are pouncing on what they see as a populist hole in Bush's armor. Late last week House Minority Leader Dick Gephardt was stumping in Chula Vista, Calif.; with transmission lines as a backdrop, he vowed to impose new federal caps on electricity rates—an idea Cheney flatly opposes.

The administration may well have raised the political risk via the process it used to draft its plan. The Bushies used a secretive, believers-only process reminiscent of another such enterprise: Hillary Rodham Clinton's effort to write a national health-care plan in 1994. Since the group comprises only government officials, White House aides say, it *is* entitled to keep its deliberations private. Still, industry leaders —who dumped $22.5 million into GOP coffers in the last election—enjoyed constant contact with the task force. Cheney met with a group of utility executives at the Edison Electric Institute, whose president, Tom Kuhn, was a leading Bush fund-raiser. No one has enjoyed better access than Enron CEO Ken Lay, who recently had dinner with his good friend the president.

The environmental community, meanwhile, got one mass meeting with the staff a month ago (and the promise of another this week with EPA Administrator Christine Todd Whitman). Efforts to meet with Cheney were rebuffed. Cheney himself confirmed he had not met with a single spokesman for the greens. That dynamic has only fueled suspicions among enviros about what's going on behind closed doors. "They're drumming up a fake energy crisis that doesn't exist," says Phil Clapp of the National Environmental Trust.

To be sure, the Cheney report will make many nods in the direction of conservation and renewable resources. Cheney confirmed that it will call for tax credits for both. The plan will herald and encourage the advent of less intrusive, high-tech means for finding and extracting oil and gas and for burning more coal. White House spinners have decided to divide the report into five parts—only two of which will deal with the extraction and the transmission of new sources of traditional types of fuel. The conservation measures will be high tech and optimistically can-do about using Yankee ingenuity to give Americans all the cars and appliances they want while using less electricity from state-of-the-art power plants. But there will be no paeans to the kind of pantywaist, tree-hugging self-abnegation the Bushies think President Carter sermonized about a generation ago. "This isn't about not bathing or turning off your lights," said a top Cheney aide. "This is about finding environmentally safe ways to make sure we have the energy we need,"

That's not enough, environmentalists say, given the rising threat of global warming the green community is convinced comes from burning fossil fuels. "The test of any energy plan will she what it does to limit greenhouse gases," says Fred Krupp of Environmental Defense. The Union of Concerned Scientists, concerned about global warming, says that renewables and conservation could displace 20 percent of traditional electricity demand by the year 2020—and greatly lessen the need for new power plants. Cheney thinks otherwise. In that span, he said, reliance on renewables could indeed triple—a "fairly optimistic" scenario but one that would still meet only 6 percent of total electricity needs. But that estimate does not include

imposing tough new mileage standards on SUVs or mandating more efficient appliances. "Part of our task," he said, "is to focus on reality, and reality is not 'Well, gee, we'll conserve our way out, we don't have to produce any more,' or 'Wind and solar will take care of it, so we don't need fossilfuels anymore'."

Now comes the hard part: selling the plan to the public and to Congress. Some GOP strategists are sanguine about overcoming environmental concerns. "Nothing like $3-a-gallon gasoline to help make the case," said one. But it's probably not that simple. White House strategists are looking for clues on how best to hawk the package in polls done for them by the Republican National Committee. The surveys show that voters know very little about where energy supplies come from or how they now are distributed in what has become a relatively deregulated marketplace. "Voters out there think that the government guarantees cheap, abundant energy," said one worried Republican polltaker, "and that's not the way it works anymore." Other insiders worry less about the Democrats than the news media, which they regard as addicted to showing videotape of belching smokestacks. "Bush will have the bully pulpit," says GOP consultant Alex Castellanos, "but it's not an easy sell."

But sell Bush must. He'll take his show on the road next week, joined by a fleet of cabinet secretaries. They will declare that action is needed after years of Clinton-administration neglect. They will say that there are no quick fixes, and tout their market-based, supply-side, long-term answers. They may use real-world vignettes about energy shortages. (on request, the Natural Gas Supply Association provided the White rouse some.) But politics is lived in the short term, and

Bush late last week suddenly found himself in the role of conservation advocate. He ordered federal facilities in California to turn up thermostats, and pledged that they would reduce electricity use by 10 percent. Cheney, the interview over, hurried to the Cabinet Room for the announcement. It turns out that conservation matters a great deal, at least in California, at least for now.

GRAPHIC PHTO: Inner circle Cheney presiding over a meeting of the Energy Task Force last week in the vice president's ceremonial office; PHOTO: The outsider: Clapp claims the Bushies may he ginning up a fake energy crisis; GRAPHIC: (Chart) Energy Advocates in the Bush Pipeline (Graphic omitted)

LOAD-DATE: May 9, 2001

[SEAL]

Judicial Watch

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***TX REPORT ***

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FAX

TO: Vice President Cheney From: Larry Kayrnan, Esq.

Fax: 202-456-1798 Date: June 25, 2001

Phone: Pages: 7

Re: Energy Pollicy Development Group CC:

☐Urgent ☐For Review ☐Please Coment ☐Please Reply ☐Please Recyle

comments:

ATTACHMENT 9

OFFICE OF THE VICE PRESIDENT

WASHINGTON

July 5, 2001

Larry Klayman, Esq.
General Counsel, Judicial Watch, Inc.
501 School Street SW, Suite 725
Washington, D.C. 20024

Dear Mr. Klayman:

This is in response to your letter dated June 25, 2001 to the Vice President, Please be advised that the National Energy Policy Development Group is not an "advisory committee" under the Federal Advisory Committee Act and is therefore not subject to FACA's terms, noting especially that it is composed entirely of full-time officers of the Federal Government. In addition, the Freedom of Information Act does not provide for disclosure of the materials you requested. See, 18 U.S. Op. Ofc. Legal Counsel 10 (1994).

Sincerely,

/s/ DAVID S. ADDINGTON
DAVID S. ADDINGTON
Counsel to the Vice President

ATTACHMENT 10

Copyright 2001 The New York Times Company

The New York Times
June 26, 2001, Tuesday, Late Edition-Final

SECTION: Section A; Page 17; Column 1; National Desk

LENGTH: 465 words

HEADLINE: Cheney Withholds List of Those Who Spoke to Energy Panel

BYLINE: by JOSEPH KAHN

DATELINE: WASHINGTON, June 25

BODY:

Vice President Dick Cheney has declined to identify the people who met privately with his energy task force, raising tensions with Congressional investigators who have repeatedly requested the information.

The General Accounting Office, an investigative arm of Congress, sent Mr. Cheney's office a letter late last week complaining that a month had passed since it first submitted an inquiry about the workings of the task force. The letter said the vice president had a legal obligation to provide the information immediately.

Mr. Cheney's office said the letter was sent one day after it submitted 77 pages of documents to the accounting office.

"Our correspondence crossed in the mail," said Juleanna Glover Weiss, a spokeswoman for Mr. Cheney.

But Ms. Weiss said the vice president had not provided the names of people, including industry executives, who may have influenced the formation of

the Bush administration's energy policy, which was released last month.

"Our counsel and the G.A.O. will continue to talk about this," Ms. Weiss said.

The energy task force Mr. Cheney headed spent several months compiling a lengthy energy strategy that contained about 150 recommendations for administrative and legislative actions to address what it termed an energy crisis.

Administration officials have said that they met with a wide variety of people concerned about energy issues, including executives of oil, natural gas, electricity, nuclear power and energy infrastructure companies. They have declined to provide a list of people who had access to the task force.

Some Democrats have asserted that leading Republican donors had special access to the task force and that the energy policy is skewed toward measures favored by major corporations. Two Democratic representatives, Henry A. Waxman of California and John D. Dingell of Michigan, asked the accounting office to report on the officials who served on the task force, what information was collected by the panel, whom they met with and how much the task force spent.

The White House provided the G.A.O. with the financial records of the task force. But administration officials have told the investigative body that they are not compelled to provide the names of outsiders who met with the task force.

The accounting office's general counsel, Anthony H. Gamboa, said in a letter to Mr. Cheney's office last week that the investigative body is entitled to more information.

The letter warned that if the White House does not provide the full range of information the G.A.O. is seeking, it may issue a "demand letter," a more forma request. Under the law, the White House would have 20 days to respond.

If the dispute continues, the accounting office could bring a civil action against the administration.

http://www.nytimes.com

LOAD-DATE: June 26, 2001

DAILY NEWS
express

Cheney Won't Give Up Names

EXPRESS WIRE SERVICES

WASHINGTON

Vice President Dick Cheney remained locked in a battle with the General Accounting Office today over the activities of a White House energy task force.

The GAO, the investigative arm of Congress, has requested a meeting with Cheney discuss an energy task force, of which Cheney was chairman.

Cheney aide Juleanna Glover Weiss said the vice president's office had already forked over a 77-page "financial account of the task force," but has not agreed to meet the GAO request to turn over the names of the people who met with the task force."

"We're still talking to the GAO about that," Weiss said.

The White House task force headed by Cheney met with officials from the oil, natural gas, electric, and nuclear industries, among others, in developing the Bush administration's new national energy plan unveiled last month.

Reps. John Dingell (D-Mich.) And Henry Waxman (D-Calif.) Asked the GAO in April to investigate the task force.

"It is past time for the American People to find out what went on in Cheney's energy task force," Dingell said yesterday. "What are they hiding?"

Original Publication Date: 6/26/01

The Associated Press

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June 25, 2001, Monday, BC cycle

SECTION: Business News, Washington Dateline

LENGTH: 504 Words

HEADLINE: Congress demands list of participants in Cheney energy meetings

BYLINE: By SCOTT LINDLAW, Associated Press Writer

DATELINE: WASHINGTON

BODY:

Congressional investigators are intensifying pressure on the White House to identify who met privately with Vice President Dick Cheney's energy task force.

The General Accounting Office has sent Cheney's lawyer a 10-page letter asserting a legal right to the lists and advising Cheney that it may make a formal demand for the information, rather than the polite requests it has made in recent weeks.

Comptroller General David M. Walker "Is prepared to issue a demand letter . . . if we do not receive timely access to the information," the GAO said in 10-page letter dated Friday from office General Counsel Anthony H. Gamboa to David S. Addington, attorney for the vice president.

The GAO is the investigative arm of Congress, and it has legal authority to federal agency records under

the law. A demand letter could begin a legal battle: It would give Cheney's office 20 days to respond, either by turning over the names, or providing a reason why it is not compelled to do so, said Lynn Gibson, a lawyer for the GAO.

If Cheney declined to turn over the records, the GAO wold notify Congress and Attorney General John Ashcroft, among others. The GAO would also be authorized to file a civil action in court seeking the record, Gibson said.

She knew of no previous case in which the GAO was forced to go to court to obtain agency records.

The White House team that developed the national energy plan, released last month, met with more than 130 interest groups, from environmentalists and unions, often at odds with Republicans, to major Bush supporters who got private sessions with Cheney.

Reps. Henry Waxman, D-Calif., and John Dingell, D-Mich., in April asked the GAO to provide information on who served on the task force, what information was presented to the panel, who presented it and what the task force spent.

The White House has asserted that the GAO does not have the authority to ask for names of participants. However, it agreed that the GAO is entitled to financial records of the task force, and two administration officials said the vice president's office provided 77 pages of financial documents to the GAO last week.

The GAO contends it is entitled to a wider range of records. Federal law "extends GAO's audit authority to all matters related to the use of public money, not just matters related to costs of activities," it argued in its letter to Cheney. "Over the years, GAO has

conducted many reviews that involved a wide range of White House programs and activities."

Juleanna Glover Weiss, a spokeswoman for Cheney, declined to comment on the GAO's assertions, other than to say, "I'm sure the GAO and the vice president's office will be talking about that."\

Waxman and Dingell called on Cheney to provide the information they seek.

"The vice president should stop stonewalling and start cooperating with GAO's investigation," Waxman said Monday. "Congress is entitled to know the identity of the special interests that met with the Cheney energy task force."

LOAD-DATE: June 26, 2001

ATTACHMENT 11

OFFICE OF THE VICE PRESIDENT

WASHINGTON

January 3, 2002

The Honorable Henry A. Waxman
House of Representatives
Washington, D.C. 20515

Dear Representative Waxman:

This is in response to your inquiry by letter of December 4, 2001 about meetings between the Vice President or the former National Energy Policy Development Group's ("Group") support staff and representatives of the Enron Corporation during the preparation of the National Energy Policy that was published on May 17, 2001. The Enron Corporation announced on December 2, 2001 that Enron and certain of its subsidiaries had filed voluntary petitions, for reorganization under Chapter 11 of Title 11 of the U.S. Code in the U.S. Bankruptcy Court for the Southern District of New York. Your letter stated that you viewed it as appropriate to ask whether Enron had communicated "information about its precarious financial position" in any meetings.

Enron did not communicate information about its financial position in any of the meetings with the Vice President or with the National Energy Policy Development Group's support staff. These meetings are described below.

As the Vice President mentioned in his interview on the *Frontline* program on May 17, 2001, the Vice President met with Mr. Kenneth L. Lay, chairman and chief executive officer of the Enron Corporation. The meeting occurred on April 17, 2001 and lasted for about a half-hour. They discussed energy policy matters, including the energy crisis in California, and did not discuss information concerning the financial position of the Enron Corporation.

The National Energy Policy Development Group, which existed from January 29, 2001 to September 30, 2001, had a support staff. As you may recall from my letter to you of May 4, 2001, individuals on the Group support staff met, prior to issuance of the National Energy Policy, with many individuals to gather information relevant to the Group's work. The Group's support staff held such meetings with a broad representation of people potentially affected by the Group's work, including individuals involved with companies or industries (e.g., in the electricity, telecommunications, coal mining, petroleum, gas, refining, bioenergy, solar energy, nuclear energy, pipeline, railroad and automobile manufacturing sectors); environmental, wildlife, and marine advocacy; State and local utility regulation and energy management; research and teaching at universities; research and analysis at policy organizations (i.e., think tanks); energy consumers, including consumption by businesses and individuals; major labor unions; and many Members of Congress or their staffs.

Included among those with whom the Group's support staff met were representatives of the Enron Corporation. The Executive Director of the support staff met on February 22 and March 7, 2001 with Enron representatives and reports that they discussed energy policy matters and did not discuss information concerning the financial position of the Enron Corporation. On April 9, 2001, Group support staff held a meeting with about two dozen representatives of various utilities, which was known to include an Enron representative and which did not involve discussion concerning the financial position of the Enron Corporation.

Two additional meetings occurred after publication of the National Energy Policy, one of which was after the termination of the Group. The Deputy Executive Director of the support staff met on August 7, 2001 with officials of an Enron German subsidiary and reports that they discussed energy policy matters and did not discuss information concerning the financial position of the Enron Corporation. An employee on the Vice President's staff, who previously was the Executive Director of the Group's support staff, met on October 10, 2001 with Enron representatives and reports that they discussed energy policy matters and did not discuss information concerning the financial position of the Enron Corporation.

To summarize, as the above information reflects, during the period that the National Energy Policy was in formulation, the Vice President had only one meeting with Mr. Lay, which was the meeting that the Vice-President mentioned on television in May. During the same period, the National Energy Policy Development Group's support staff, which had meetings with a broad range of individuals involved in energy matters, had

two meetings with Enron representatives, plus a meeting with utility representatives that included an Enron representative. Also described above were two staff-level meetings that occurred well after issuance of the National Energy Policy. None of these meetings included discussion of the financial position of the Enron Corporation.

I note for your information that the Vice President and Mr. Lay of Enron Corporation both served on a panel on June 24, 2001 at the American Enterprise Institute World Forum in Beaver Creek, Colorado. The panel was widely attended and addressed energy matters. There was no discussion of information concerning the financial position of Enron Corporation.

Your letter mentioned a number of Federal officials not employed by the Office of the Vice President. To the extent you wish to inquire about their official activities, I would respectfully refer you to their employing departments, agencies or offices.

The information above is provided to you as a matter of comity between the legislative and executive branches, with due regard for constitutional separation of powers, and reserving all legal authorities and privileges that may apply. It is our hope that submission of the information will help you avoid the waste of time and taxpayer funds on unnecessary inquiries.

Sincerely,

/s/ DAVID S. ADDINGTON
DAVID S. ADDINGTON
Counsel to the Vice President

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF CALIFORNIA

Case No.: C 02 0462

SIERRA CLUB, A CALIFORNIA NONPROFIT CORPORATION, PLAINTIFF

v.

VICE PRESIDENT RICHARD CHENEY, IN HIS OFFICIAL CAPACITY AS VICE PRESIDENT OF THE UNITED STATES AND CHAIRMAN OF THE NATIONAL ENERGY POLICY DEVELOPMENT GROUP

THE NATIONAL ENERGY POLICY DEVELOPMENT GROUP, AN ADVISORY COMMITTEE COMMISSIONED BY PRESIDENT GEORGE W. BUSH, JR.,

ANDREW LUNDQUIST, IN HIS OFFICIAL CAPACITY AS EXECUTIVE DIRECTOR OF THE NATIONAL ENERGY POLICY DEVELOPMENT GROUP, AND DIRECTOR OF ENERGY POLICY FOR VICE PRESIDENT CHENEY AND SENIOR POLICY ADVISOR TO THE DEPARTMENT OF ENERGY,

SPENCER ABRAHAM, IN HIS OFFICIAL CAPACITY AS SECRETARY OF THE UNITED STATES DEPARTMENT OF ENERGY AND MEMBER OF THE NATIONAL ENERGY POLICY DEVELOPMENT GROUP,

DONALD EVANS, IN HIS OFFICIAL CAPACITY AS SECRETARY OF THE UNITED STATES DEPARTMENT OF COMMERCE AND MEMBER OF THE NATIONAL ENERGY POLICY DEVELOPMENT GROUP,

GALE NORTON, IN HER OFFICIAL CAPACITY AS SECRETARY OF THE UNITED STATES DEPARTMENT OF THE INTERIOR AND MEMBER OF THE NATIONAL ENERGY POLICY DEVELOPMENT GROUP,

ANN VENEMAN, IN HER OFFICIAL CAPACITY AS SECRETARY OF THE UNITED STATES DEPARTMENT OF AGRICULTURE AND MEMBER OF THE NATIONAL ENERGY POLICY DEVELOPMENT GROUP,

PAUL O'NEILL, IN HIS OFFICIAL CAPACITY AS SECRETARY OF THE UNITED STATES DEPARTMENT OF THE TREASURY AND MEMBER OF THE NATIONAL ENERGY POLICY DEVELOPMENT GROUP,

NORMAN MINETA, IN HIS OFFICIAL CAPACITY AS SECRETARY OF THE UNITED STATES DEPARTMENT OF TRANSPORTATION AND MEMBER OF THE NATIONAL ENERGY POLICY DEVELOPMENT GROUP,

CHRISTINE TODD WHITMAN, IN HER OFFICIAL CAPACITY AS ADMINISTRATOR OF THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY AND MEMBER OF THE NATIONAL ENERGY POLICY DEVELOPMENT GROUP, DEFENDANTS

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF
Violations of Federal Advisory Committee Act, 5 U.S.C. Appendix 2

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

INTRODUCTION

The Sierra Club brings this action to enforce the Federal Advisory Committee Act, 5 U.S.C. Appendix 2,

("FACA"), a "sunshine law" providing for public scrutiny of the manner in which the Executive Branch obtains advice from private individuals on policy matters. The Sierra Club seeks access to information under FACA concerning the activities of the National Energy Policy Development Group (better known colloquially as the "Cheney Energy Task Force"), and its related sub-groups ("Task Force Sub-Groups"). The Cheney Energy Task Force is a Presidential advisory committee, the purpose of which is to gather information, deliberate and make recommendations to the President on national energy policy.

JURISDICTION

1. This Court has jurisdiction over this action under 28 U.S.C. § 1331 (action arising under the laws of the United States), 28 U.S.C. § 1361 (mandamus), 5 U.S.C. §§ 701 *et seq.* (Administrative Procedure Act) and 28 U.S.C. §§ 2201 and 2202 (Declaratory Judgment Act). Venue in this district is proper under 28 U.S.C. § 1391(e) because the Sierra Club is incorporated in California and maintains its headquarters and resides in this district.

INTRADISTRICT ASSIGNMENT

2. Pursuant to Civil Local Rule 3-2(c), Plaintiff states that it bases venue in this district and the San Francisco Division on the following: 1) Plaintiff is incorporated in California and maintains its headquarters and resides in San Francisco County; 2) this action seeks relief against federal officials acting in their official capacities; and 3) 28 U.S.C. §§ 1361 and 1391(e) provide for venue in the district of Plaintiff's residence, including the San Francisco Division.

PARTIES

3. Plaintiff Sierra Club is a nonprofit corporation organized under California law, with more than 700,000 members nationwide. The Sierra Club's mission is to explore, enjoy, and protect the wild places of the Earth; to practice and promote the responsible use of the Earth's resources and ecosystem; to educate and enlist humanity to protect and restore the quality of the natural and human environment; and to use all lawful means to carry out these objectives.

4. The Sierra Club's concerns encompass the nation's use of energy and the environmental and health impacts caused by the development, extraction, production and use of energy. The Sierra Club has actively participated in the public discussion regarding the Bush Administration's national energy policy. The Sierra Club has educated its members about national energy policy, participated in and organized community events, such as rallies and demonstrations; discussed energy policy with members of Congress and other government leaders, and sought to disseminate information on energy policy via the media.

5. Sierra Club members reside in, work in, and regularly visit, use, and enjoy areas that would be affected by the Bush Administration's energy policy. These areas include, among many examples, federal public lands, national forests, and coastal areas subject to oil and gas drilling and related activities; and populated areas downwind of power plants and other sources of energy-caused pollution. Moreover, Sierra Club members routinely make use of information concerning energy policy while engaging in First Amendment activities as environmentalists and Sierra Club members.

6. Defendant Richard Cheney is sued in his official capacity as the Vice President of the United States and Chairman of the Cheney Energy Task Force. As the Chairman of the Cheney Energy Task Force, Vice President Cheney acted on behalf of the President in gathering information, advice and recommendations on national energy policy and supervising the work of the Cheney Energy Task Force and the Task Force Sub-Groups. He participated in meetings and deliberations, and his office contributed to the formulation of the Bush Administration's national energy policy.

7. Defendant National Energy Policy Development Group ("Cheney Energy Task Force") is a Presidential advisory committee, the purpose of which is to gather information, deliberate and make recommendations to the President on national energy policy.

8. Defendant Lundquist is sued in his official capacity as Executive Director of the Cheney Energy Task Force, Director of Energy Policy for Vice President Cheney, and Senior Policy Advisor to the U.S Department of Energy. As the Executive Director of the Cheney Energy Task Force, he participated in its meetings and deliberations, and contributed to the formulation of the Bush Administration's national energy policy.

9. Defendant Abraham is sued in his official capacity as Secretary of Energy and member of the Cheney Energy Task Force. Defendant Abraham participated in Cheney Energy Task Force meetings and deliberations, and he and his agency gathered information, advice and recommendations on national energy policy and supervised the work of the Cheney Energy Task Force and the Task Force Sub-Groups.

10. Defendant Evans is sued in his official capacity as Secretary of Commerce and member of the Cheney Energy Task Force. Defendant Evans participated in Cheney Energy Task Force meetings and deliberations, and he and his agency gathered information, advice and recommendations on national energy policy and supervised the work of the Cheney Energy Task Force and the Task Force Sub-Groups.

11. Defendant Norton is sued in her official capacity as Secretary of the Interior and member of the Cheney Energy Task Force. Defendant Norton participated in Cheney Energy Task Force meetings and deliberations, and she and her agency gathered information, advice and recommendations on national energy policy and supervised the work of the Cheney Energy Task Force and the Task Force Sub-Groups.

12. Defendant Veneman is sued in her official capacity as Secretary of Agriculture and member of the Cheney Energy Task Force. Defendant Veneman participated in Cheney Energy Task Force meetings and deliberations, and she and her agency gathered information, advice and recommendations on national energy policy and supervised the work of the Cheney Energy Task Force and the Task Force Sub-Groups.

13. Defendant O'Neill is sued in his official capacity as Secretary of the Treasury and member of the Cheney Energy Task Force. Defendant O'Neill participated in Cheney Energy Task Force meetings and deliberations,, and he and his agency gathered information, advice and recommendations on national energy policy and supervised the work of the Cheney Energy Task Force and the Task Force Sub-Groups.

14. Defendant Mineta is sued in his official capacity as Secretary of Transportation and member of the Cheney Energy Task Force. Defendant Mineta participated in Cheney Energy Task Force meetings and deliberations, and he and his agency gathered information, advice and recommendations on national energy policy and supervised the work of the Cheney Energy Task Force and the Task Force Sub-Groups.

15. Defendant Whitman is sued in her official capacity as Administrator of the Environmental Protection Agency and member of the Cheney Energy Task Force. Defendant Whitman participated in Cheney Energy Task Force meetings and deliberations, and she and her agency gathered information, advice and recommendations on national energy policy and supervised the work of the Cheney Energy Task Force and the Task Force Sub-Groups.

BACKGROUND

The Cheney Energy Task Force

16. On or about January 29, 2001, George W. Bush signed a memorandum to his Vice President, Richard Cheney, commissioning the Cheney Energy Task Force. The Presidential memorandum stated that the purpose of the Cheney Energy Task Force was to develop a national energy policy. The membership of the Cheney Energy Task Force included the defendants.

17. The Cheney Energy Task Force held its first meeting on or about January 29, 2001. The Task Force held at least eight additional meetings between February and May of 2001 and, on information and belief, continued its activities thereafter.

18. On information and belief, the defendants arranged, participated in and exercised responsibility over meetings and other activities involving groups of energy industry executives and other non-federal employees, for the purpose of obtaining advice and recommendations on the Administration's national energy policy. These groups are what are referred to as the "Task Force Sub-Groups" in this Complaint.

19. On information and belief, the Cheney Energy Task Force and Task Force Sub-Groups were not composed wholly of full time officers or employees of the federal government. Energy industry executives, including multiple representatives of single energy companies, and other non-federal employees, attended meetings and participated in activities of the Cheney Energy Task Force and Task Force Sub-Groups.

20. On information and belief, the participants in the Cheney Energy Task Force and the Task Force Sub-Groups interacted significantly and acted collectively in expressing their viewpoints and advice on energy policy.

21. On information and belief, there was continuity in the membership of the Cheney Energy Task Force and Task Force Sub-Groups.

22. On or about May 16, 200 1, the Cheney Energy Task Force submitted a report to President Bush, setting forth the Task Force's findings and recommendations for a "National Energy Policy."

23. The Cheney Energy Task Force and the Task Force Sub-Groups were established or utilized by the President and the defendants for the purpose of obtaining information, advice and recommendations for the development of the "National Energy Policy." The

Bush Administration has developed legislative proposals based on the "National Energy Policy." The House of Representatives has passed legislation containing many of the elements of this National Energy Policy. That legislation and related energy policy legislative proposals are still pending.

The Bush Administration's Failure to Divulge Cheney Energy Task Force Information

24. The defendants have refused to provide information to Congress, the General Accounting Office or the public (including the Sierra Club) concerning the names of non-federal employees who participated in the activities of the Cheney Energy Task Force and Task Force Sub-Groups, or details about the number of meetings such individuals attended, the agendas of each meeting, the purpose and scope of the meeting(s), the topics on which factual information or policy advice was sought, and whether conflicts of interest were properly addressed at each meeting.

25. Throughout the spring and summer of 2001, and continuing to the present, Congressional leaders and the General Accounting Office (GAO) have sought to obtain information from the Cheney Energy Task Force and its members concerning the activities and membership of the Cheney Energy Task Force and Task Force Sub-Groups. Representatives Henry Waxman and John Dingell, GAO Comptroller General David Walker and GAO General Counsel Anthony Gamboa have requested access to Cheney Energy Task Force and Task Force Sub-Group information, corresponding numerous times with Vice President Cheney, Cheney Energy Task Force Executive Director Andrew Lundquist, and Counsel to the Vice President David Addington.

26. The Vice President, Mr. Lundquist, and Mr. Addington have failed to provide the information requested by Representatives Waxman and Dingell and the GAO.

27. On or about January 16, 2002, Representative Henry Waxman issued a report detailing how the Cheney Energy Task Force's final report advocated energy policies favoring private companies whose representatives participated in the activities of the Cheney Energy Task Force and Task Force Sub-Groups.

28. The Sierra Club has corresponded with the defendants requesting information relating to activities of the Cheney Energy Task Force and the Task Force Sub-Groups including, but not limited to, the involvement of non-federal employees. Defendants have failed to provide this information to the Sierra Club. The Sierra Club intends to use this information to educate its members and, on behalf of its members, to participate actively in the ongoing national debate over energy policy, including but not limited to specific legislative proposals pending in Congress.

FIRST CLAIM FOR RELIEF
(Violations of FACA / Mandamus)

29. The Sierra Club incorporates by reference the allegations of the preceding paragraphs of this Complaint.

30. The Cheney Energy Task Force and Task Force Sub-Groups are advisory committees as defined under FACA.

31. The defendants have violated FACA as follows:

a. By failing to open each meeting of the Cheney Energy Task Force and Task Force Sub-Groups to the public. (Violation of FACA § 10(a)(1).)

b. By failing to publish timely notice of each meeting of the Cheney Energy Task Force and Task Force Sub-Groups in the Federal Register. (Violation of FACA § 10(a)(2).)

c. By failing to allow the Sierra Club and other interested persons to attend, appear before, or file statements with the Cheney Energy Task Force and Task Force Sub-Groups. (Violation of FACA § 10(a)(3).)

d. By failing to make available for public inspection and copying the records, reports, transcripts, minutes, appendices, working papers, drafts, studies, agenda, or other documents which were made available to or prepared for or by the Cheney Energy Task Force and Task Force Sub-Groups. (Violation of FACA § 10(b).)

e. By failing to keep detailed minutes of each meeting of the Cheney Energy Task Force and Task Force Sub-Groups, certified as accurate, that contain a record of the persons present, a complete and accurate description of matters discussed and conclusions reached and copies of all reports received, issued, or approved by the Cheney Energy Task Force and Task Force Sub-Groups. (Violation of FACA § 10(c).)

f. By establishing the Task Force Sub-Groups without specific authorization by statute or by the President and without a determination, published in the Federal Register, that establishing the Task Force Sub-Groups is in the public interest. (Violation of FACA § 9(a).)

g. By allowing the Cheney Energy Task Force and Task Force Sub-Groups to meet and take action without filing an advisory committee charter containing the information required by FACA. (Violation of FACA § 9(c).)

32. The defendants have a nondiscretionary duty to comply with the procedural requirements of FACA including but not limited to those set forth in the preceding paragraph as items (a) through (g).

33. This Court has jurisdiction to compel the defendants to perform a nondiscretionary duty pursuant to the Mandamus and Venue Act, 28 U.S.C. § 1361.

SECOND CLAIM FOR RELIEF
(Violations of FACA / Administrative Procedure Act)

34. The Sierra Club incorporates by reference the allegations of the preceding paragraphs of this Complaint.

35. By violating FACA as set forth in paragraph 11, the agency defendants have acted arbitrarily and capriciously and not in accordance with law, and without observance of procedure required by law, in violation of 5 U.S.C. § 706(2)(A) and § 706(2)(D).

PRAYER FOR RELIEF

36. The Sierra Club prays for relief and judgment as follows:

A. A declaration that the Cheney Energy Task Force and Task Force Sub-Groups are advisory committees under FACA and must comply with all requirements of FACA, 5 8 U.S. C. Appendix 2, and other applicable laws.

B. A declaration that the defendants have violated FACA in the following ways:

i. Defendants violated section 10(a)(1) of FACA by failing to open each meeting of the Cheney Energy Task Force and Task Force Sub-Groups to the public.

ii. Defendants violated section 10(a)(2) of FACA by failing to publish timely notice of each meeting of the Energy Task Force and Task Force Sub-Groups in the Federal Register.

iii. Defendants violated section 10(a)(3) of FACA by failing to allow the Sierra Club and other, interested persons to attend, appear before, or file statements with the Cheney Energy Task Force and Task Force Sub-Groups.

iv. Defendants violated section 10(b) of FACA by failing to make available for public inspection and copying the records, reports, transcripts, minutes, appendices, working papers, drafts, studies, agenda, or other documents which were made available to or prepared for or by the Cheney Energy Task Force and Task Force Sub-Groups.

v. Defendants violated section 10(c) of FACA by failing to keep detailed minutes of each meeting of the Energy Task Force and Task Force Sub-Groups, certified as accurate, that contain a record of the persons present, a complete and accurate description of matters discussed and conclusions reached and copies of all reports received, issued, or approved by the Cheney Energy Task Force and Task Force Sub-Groups.

vi. Defendants violated section 9(a) of FACA by establishing the Task Force Sub-Groups without specific authorization by statute or by the President and without a determination, published in the Federal Register, that establishing the sub-groups is in the public interest.

vii. Defendants violated section 9(c) of FACA by allowing the Cheney Energy Task Force and Task Force Sub-Groups to meet and take action without filing an advisory committee charter containing the information required by section 9(c) of FACA.

C. A declaration that the defendants have failed to perform a nondiscretionary duty to comply with the procedural requirements of FACA including those set forth in the preceding paragraph as items (i) through (vii).

D. A declaration that each violation of FACA described above as items (i) through (vii) in paragraph B is arbitrary and capricious and not in accordance with law, and, without observance of procedure required by law, in violation of 5 U.S.C. § 706(2)(A) and (D).

E. A permanent injunction prohibiting the defendants from convening, conducting or holding any activities of the Cheney Energy Task Force and Task Force Sub-Groups that are not in full compliance with sections 5, 9 and 10(a)-(c) of FACA.

F. A permanent injunction ordering the defendants to provide to the Sierra Club, within ten working days and at no cost to the Sierra Club, a full and complete copy of all records, reports, transcripts, minutes, appendixes, working papers, drafts, studies, agenda, or other documents which were made available to or prepared for or by the Cheney Energy Task Force or Task Force Sub-Groups, irrespective of whether any such document otherwise is or could be exempt from disclosure under 5 U.S.C. § 552(b)(2), (5) or (7)-(9).

G. A permanent injunction ordering the defendants to prepare and deliver to plaintiff, within 10 working days, detailed minutes of each meeting of the Cheney Energy Task Force and Task Force Sub-Groups, certified as accurate, that contain a record of the persons present, a complete and accurate description of matters discussed and conclusions reached and copies of all reports received, issued, or approved by the Cheney Energy Task Force and Task Force Sub-Groups.

H. An award to the Sierra Club of its costs of suit.

I. An award of such other relief as this Court deems appropriate.

DATED: January 25, 2002.

Respectfully submitted,

/s/ ALEX LEVINSON
Patrick Gallagher
Alex Levinson
Sierra Club
Attorneys of Record

CERTIFICATION OF INTERESTED PARTIES OR ENTITIES

Pursuant to General Order No. 48, the undersigned certifies that as of this date, there is no such interest to report.

Dated: January 25, 2002.

Respectfully submitted,

/s/ ALEX LEVINSON
Patrick Gallagher
Alex Levinson
Joanne Spalding
Sierra Club
Attorneys of Record

THE WHITE HOUSE

WASHINGTON

January 29, 2001

MEMORANDUM FOR

THE VICE PRESIDENT
THE SECRETARY OF THE TREASURY
THE SECRETARY OF THE INTERIOR
THE SECRETARY OF AGRICULTURE
THE SECRETARY OF COMMERCE
THE SECRETARY OF TRANSPORTATION
THE SECRETARY OF ENERGY
THE DIRECTOR OF THE FEDERAL EMERGENCY MANAGEMENT AGENCY
THE ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY
THE ASSISTANT TO THE PRESIDENT AND DEPUTY CHIEF OF STAFF FOR POLICY
THE ASSISTANT TO THE PRESIDENT FOR ECONOMIC POLICY
THE ASSISTANT TO THE PRESIDENT FOR INTERGOVERNMENTAL AFFAIRS

SUBJECT: National Energy Policy Development Group

One of the greatest challenges facing the private sector and Federal, State, and local governments is ensuring that energy resources are available to meet the needs of our citizens and our economy. To help address this challenge, I am asking the Vice President to lead the development of a national energy policy designed to help the private sector, and government at all levels, promote dependable, affordable, and environmentally sound production and distribution of energy for the future. Accordingly, I direct as follows:

1. Establishment. There is hereby established within the Executive Office of the President an Energy Policy Development Group, consisting of the following officers of the Federal Government: the Vice President, Secretary of the Treasury, Secretary of the Interior, Secretary of Agriculture, Secretary of Commerce, Secretary of Transportation, Secretary of Energy, Director of the Federal Emergency Management Agency, Administrator of the Environmental Protection Agency, Assistant to the President and Deputy Chief of Staff for Policy, Assistant to the President for Economic Policy, and Assistant to the President for Intergovernmental Affairs. The Vice President may also invite the Chairman of the Federal Energy Regulatory Commission to participate. The Vice President nay invite the participation of the Secretary of State when the work of the Energy Policy Development Group involves international affairs and, as appropriate, other officers of the Federal Government. The Vice President shall preside at meetings of the Energy Policy Development Group, shall direct its work, and may establish subordinate working groups to assist the Energy Policy Development Group in its work.

2. Mission. The mission of the Energy Policy Development Group shall be to develop a national energy policy designed to help the private sector, and as necessary and appropriate Federal, State, and local governments, promote dependable, affordable, and environmentally sound production and distribution of energy. In carrying out this mission, the Energy Policy Development Group's functions shall be to gather

information, deliberate, and, as specified in this memorandum, make recommendations to the President. Its activities shall not supplant the authority and responsibility of State and local governments for handling energy production, purchase, and distribution difficulties.

3. Reports. The Energy Policy Development Group should submit reports to me as follows: (a) in the near term, an assessment of the difficulties experienced by the private sector, and State and local governments in ensuring that local and regional energy needs are met, and (b) as soon thereafter as practicable, a report setting forth a recommended national energy policy designed to help the private sector, and as necessary and appropriate State and local governments, promote dependable, affordable, and environmentally sound production and distribution of the energy for the future. The recommended national energy policy should take into consideration, among other things, (i) the growing demand for energy, locally, regionally, and nationally, in the United States and in the world, (ii) the potential for local, regional, or national disruptions in energy supplies or distribution, and (iii) the need for responsible policies to protect the environment and promote conservation, and (iv) the need for modernization of energy generation, supply, and transmission infrastructure.

4. Funding. The Department of Energy shall, to the maximum extent permitted by law and consistent with the need for funding determined by the Vice President after consultation with the Secretary of Energy, make funds appropriated to the Department of Energy available to pay the costs of personnel to support the activities of the Energy Policy Development Group. If a situation arises in which Department of Energy

appropriations are not available for a category of expenses of the Energy Policy Development Group, the Vice President or his designee should submit to me a proposal for use, consistent with applicable law, of the minimum necessary portion of any appropriation available to the President to meet the unanticipated need. The Vice President may also obtain, through the Assistant to the President for Economic Policy, such assistance from the National Economic Council staff as the Vice President deems necessary.

5. Termination. The Energy Policy Development Group shall terminate no later than the end of fiscal year 2001.

/s/ GEORGE BUSH
GEORGE BUSH

cc: Secretary of State
Chairman, Federal Energy Regulatory Commission

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No.: 01-1530 (EGS)

JUDICIAL WATCH, INC., *ET AL.*, PLAINTIFFS

v.

NATIONAL ENERGY POLICY DEVELOPMENT GROUP, *ET AL.*, DEFENDANTS

SIERRA CLUB, PLAINTIFF

v.

VICE PRESIDENT RICHARD CHENEY, *ET AL.*, DEFENDANTS

PLAINTIFFS' PROPOSED DISCOVERY PLAN

Pursuant to this Court's order of July 11, 2002, plaintiffs submit this proposed Discovery Plan.

Subjects of Discovery

Plaintiffs intend to take initial discovery on the following subjects:[1]

A. The structure of the Task Force and its working groups, sub-groups, staff, and personnel; *e.g.*, how many sub-groups exist, their roles, staff, meetings, location of meetings, and other proceedings. *See Judicial Watch,*

[1] Drafts of plaintiffs' First Set of Interrogatories and First Request for the Production of Documents are attached hereto as Exhibits A and B, respectively.

Inc. v. *National Energy Policy Dev. Group*, Civ. No. 01-1530, slip op. at 70 (July 11, 2002) ("Mem.") (noting importance of "[d]etermining who participated in the deliberations of the NEPDG and the alleged Sub-Groups," and "whether in fact those Sub-Groups existed"); *Association of Am. Physicians & Surgeons* v. *Clinton*, 997 F.2d 898, 915 (D.C. Cir. 1993) (noting importance of "purpose, structure, and personnel of the group" in "determin[ing] whether [the Federal Advisory Committee Act] applies").

B. Private parties' communications with, and participation in the activities of, the Task Force and/or Task Force sub-groups, working groups, staff and personnel; *e.g.*, who attended Task Force meetings and their role at these meetings, which private parties communicated with the Task Force, the contents of these communications. *See* Mem. at 70 (noting importance of determining "who interacted with the private individuals involved, the role played by private individuals, and the number of meetings and interactions"). *See also* Clinton, 997 F.2d at 915 ("If a [private party] regularly attends and fully participates in working group meetings as if he were a 'member,' he should be regarded as a member.").

C. The relationship between the agency defendants, the Task Force and/or any other advisory groups that included private individuals; *e.g.*, whether these other advisory group(s) were established and/or utilized by the Task Force or agency defendants, and whether these other group(s) were formed in the interest of advising an agency or the Task Force. *See* 5 U.S.C. App. II § 3(2) (advisory committee must be established or utilized by President or agency in order for FACA to apply). *See California Forestry Ass'n* v. *U.S. Forest*

Service, 102 F.3d 609, 611 (D.C. Cir. 1996) (where "circumstances of [the group's] genesis support an inference that [the group] was in fact established 'in the interest' of advising an agency," the group "is subject to FACA"). *See also* Mem. at 35 ("If these Sub-Groups did in fact exist, who made the decision to establish them?").

II. Anticipated Discovery

Plaintiffs' first set of interrogatories and first set of requests for production are attached hereto as Exhibits A and B, respectively. Following timely receipt of responses to this initial discovery, plaintiffs intend to notice appropriate depositions, and may also seek additional written discovery.

Pursuant to this Court's order of May 29, 2002, the Sierra Club has also served subpoenas on seven private parties, intended to ensure the preservation of discoverable documents in those parties' possession. Depending upon the defendants' responses to the Sierra Club's initial discovery, to the extent such evidence is not otherwise available the Sierra Club may request production of relevant documents or testimony from these or other third parties.

Respectfully submitted,

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Certificate Of Service

I hereby certify that a copy of this Discovery Plan was served via ECF Notification where applicable and via first class mail this 19th day of July, 2002 to:

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Kathleen M. Krust

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

C.A. No. 01-1530 (EGS)

JUDICIAL WATCH, INC., PLAINTIFF

v.

NATIONAL ENERGY POLICY DEVELOPMENT GROUP, ET AL., DEFENDANTS

C.A. No. 02-631 (EGS)

SIERRA CLUB, PLAINTIFF

v.

VICE PRESIDENT RICHARD CHENEY, IN HIS OFFICIAL CAPACITY, ET AL., DEFENDANTS

DEFENDANTS' OBJECTIONS TO
PLAINTIFFS' PROPOSED DISCOVERY PLAN

INTRODUCTION

As the Court knows, it is defendants' position that discovery is inappropriate in this case, especially in light of the strong potential for intrusion into the effective functioning of the Presidency and Vice Presidency. The Court's July 11 Order, however, significantly limits any potential discovery issues. In its Order, the Court held that plaintiffs' claim that defendants violated the Federal Advisory Committee Act ("FACA"), 5 U.S.C. app. § 2, can proceed, if at all, under the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-706, or the mandamus statute, 28 U.S.C. § 1361.

See Judicial Watch, Inc. v. National Energy Policy Dev. Group, Civ. No. 01-1530, slip op. at 42, 51 (July 11, 2002) ("Mem."). That ruling has important implications for discovery in this case. It is well settled that a court's review under the APA is confined to the administrative record compiled by the agency. That is, there is no discovery under the APA (or under the mandamus statute, where mandamus is used as a substitute for APA review). For this and other reasons set forth below, defendants object to plaintiffs' proposed discovery plan.[2]

Moreover, this case can be resolved far short of the wide-ranging inquiries plaintiffs have proposed into the conduct of the NEPDG in carrying out its Presiden-

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[2] While, given the posture of this case after the Court's July 11, 2002 Order, plaintiffs' claims should be resolved on the basis of an administrative record, defendants do not concede there was agency action, and preserve and reiterate their arguments regarding the inappropriateness of discovery in other respects as well (because plaintiffs' proposed discovery has not been approved by the Court, defendants are not submitting specific objections to plaintiffs' proposed requests). For the same reason that the application of the FACA to the activities of the National Energy Policy Development Group ("NEPDG") raises constitutional concerns, *see Association of American Physicians & Surgeons, Inc. v. Clinton*, 997 F.2d 898, 908 (D.C. Cir. 1993), permitting discovery into the questions posed by plaintiffs in their discovery plan—such as from whom the President receives advice, how he chooses to receive that advice and what that advice is—would impermissibly intrude on the effective functioning of the Presidency and Vice Presidency, especially the President's authority to obtain advice in confidence from his hand-picked advisers. *See id.* at 908 (application of FACA to health care task force "clearly would interfere with the President's capacity to solicit direct advice on any subject related to his duties from a group of private citizens, separate from or together with his closest governmental associates").

tially-assigned mission (inquiries, we note, that would severely intrude into the functioning of the Presidency and Vice Presidency). Specifically, in its opinion, the Court identified as one of the central questions posed in this case: "were any non-governmental individuals members of the NEPDG and its alleged sub-groups?" *See, e.g.*, Mem. at 54. This question, which potentially is dispositive, can and should, be resolved on the basis of the administrative record, before permitting inquiry into any of the other issues raised by this case. If the record demonstrates the answer to this question is "no," then the Court can grant summary judgment for the defendants.

Accordingly, defendants submit that further proceedings should be conducted in a manner that respects established principles under the APA and is least likely to intrude into constitutionally protected areas of inquiry. This Court's holding that plaintiffs' cause of action arises under the APA (or mandamus) makes that approach possible. In order to accomplish this objective, defendants thus propose the following.

First, defendants will file an administrative record which will address the question of membership. Defendants will then move for summary judgment on the basis of that record, as is routinely done in administrative law cases. As the Court has recognized, if neither the NEPDG nor any alleged subgroups included non-government members, defendants would be entitled to prevail on statutory grounds. *See* Mem. at 54; 5 U.S.C. app. § 3(2). The Court thus, at the very least, should resolve this critical statutory issue before proceeding to the types of inquiries suggested by plaintiffs (*see also* Mem. at 70), which, by virtue of their breadth, pose a far greater threat of constitutionally impermissible

intrusion into the effective functioning of the Presidency and the Vice Presidency. Moreover, this limited approach is consistent with this Court's view of constitutional avoidance. As this Court stated, "It is entirely possible that defendants will prevail on summary judgment on statutory grounds after proving that no private individuals participated as members of the advisory committee at issue . . . thus rendering defendants' constitutional concerns inapplicable." Mem. at 54.[3]

Defendants note that the Court already has before it a record on the membership issue, at least with respect to NEPDG. That is, the Court and the plaintiffs already have the Presidential Memorandum establishing the NEPDG (which designates the membership), the NEPDG's public report (which was submitted to the President by the NEPDG as constituted by the President), and the Office of the Vice President's response to plaintiff Judicial Watch's request for permission to attend NEPDG meetings. As explained in more detail below, however, defendants are prepared to supplement this record with a declaration specifically explaining the basis for the determination that the NEPDG is not required to comply with FACA, *i.e.*, NEPDG's membership. Defendants also are prepared to submit an administrative record (including with appropriate declarations) on the issue of membership with respect to any alleged subgroups, now that the issue has been raised here.

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[3] Ultimately, the burden of persuasion is, of course, upon the plaintiffs to prove that FACA applies to the NEPDG.

Second, the Court should establish a schedule for briefing summary judgment on the membership issue once the record is filed by defendants. As noted above, if the record demonstrates that no non-government individuals were members of the NEPDG or any alleged sub-groups, then summary judgment should be granted for defendants. *See, e.g.*, Mem. at 54. And the Court's stated goal of having a "tightly reined" process to decide the issues in this case, *see* Mem. at 74, will be accomplished.

ARGUMENT

REVIEW SHOULD BE ON THE RECORD, AND LIMITED AT THIS STAGE TO THE THRESHOLD, AND POTENTIALLY DISPOSITIVE, ISSUE OF MEMBERSHIP

A. Review Of Any Factual And Legal Issues In this Case Should Be On the Basis of the Administrative Record

The Court has held that FACA provides no private right of action and that plaintiffs' claim that defendants violated FACA can proceed, if at all, under the APA, or, potentially, under the mandamus statute. *See* Mem. at 42, 51. This holding has important consequences for this case and effectively determines the course by which any factual issues should be resolved.

In APA challenges to agency action, "the focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court." *Camp v. Pitts*, 411 U.S. 138, 142 (1973); *Nat'l Law Ctr. v. United States Dep't of Vet. Affairs*, 736 F. Supp. 1148, 1152 (D.D.C. 1990) ("It is settled that a court's review . . . is confined to the administrative record compiled by the agency"); *James Madison Ltd. v. Ludwig*, 82 F.3d 1085, 1096 (D.C. Cir. 1996) ("Generally speaking, district courts reviewing agency action under the APA's arbitrary and capricious standard do not resolve factual issues, but operate instead as appellate courts resolving legal questions."). Plaintiffs challenging agency action are not ordinarily entitled to discovery. *Marshall County Health Care Auth. v. Shalala*, 988 F.2d 1221, 1226 (D.C. Cir. 1993); *Nat'l Treasury Employees Union v. Seidman*, 786 F. Supp. 1041, 1046 (D.D.C. 1992) ("discovery is inappropriate in cases under the APA").[4]

In this case, the scope of judicial review is defined by 5 U.S.C. § 706's test for action that is arbitrary or capricious or otherwise contrary to law.[5] Under this test, the Court's review is not de novo. *Camp v. Pitts*, 411 U.S. at 142; *Commercial Drapery Contractors, Inc. v. United States*, 133 F. 3d 1, 7 (D.C. Cir. 1998). Where, however, the articulated decision may be less than clearly based upon the record, a remand or supplementation of the record may be appropriate, such as through affidavits. *Camp*, 411 U.S. at 142; *Esch v. Yeutter*, 876 F.2d 976, 991 (D.C. Cir. 1989).

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[4] The D.C. Circuit's decision in *Association of American Physicians & Surgeons, Inc. v. Clinton*, 997 F.2d 898 (D.C. Cir. 1993), does not alter this conclusion. As this Court has indicated, *AAPS* did not address the source of judicial review available to a party claiming violations of FACA. Mem. at 26. Instead, it "assumed that FACA provided a cause of action." *Id.* Therefore, the restraints on discovery applicable in an APA action were not applied in that action. However, after this Court's decision that FACA does not apply a private right of action, *id.* at 25-26, plaintiffs are constrained by the APA remedy that they seek.

[5] The arbitrary or capricious test applies because this is not formal rulemaking or adjudication or a failure to act. 5 U.S.C. § 706.

Here, there is a record before the Court, consisting of the President's memo creating the NEPDG and establishing its membership, the letter from the Office of the Vice President denying plaintiff Judicial Watch's request for documents and documenting the rationale that the FACA does not apply because its members were federal employees, and the final Report, which was submitted by the NEPDG as constituted by the President and thereby confirms, in the performance of the NEPDG's final function, that the members were those designated by the President. The only record before the Court on the question of membership thus fully supports defendant's position here. It therefore warrants summary judgment in defendants' favor.

Despite their access to thousands of pages of documents produced in related FOIA litigation, plaintiffs have proffered no evidence to demonstrate that the NEPDG's composition was any different from that directed by the President. Nevertheless, defendants will submit a declaration further addressing this issue to provide a fuller statement of the facts which supported the decision, as memorialized in the Vice President's letter, that the FACA did not apply to the NEPDG because its members were federal employees. Similar declarations will also be filed concerning the alleged subgroups. At that point, the Court would have before it a more than sufficient administrative record upon which to decide this caes.

As in any other APA record review case, plaintiffs would be able to justify going beyond that record only upon a "'strong showing of bad faith or improper behavior' or when the record is so bare that it prevents effective judicial review." *Commercial Drapery*, *supra* at 7, *quoting Citizens to Preserve Overton Park*, 401

U.S. 402, 420 (1971). Thus, plaintiffs could proffer whatever evidence they currently possess to the contrary, and the Court could determine whether that evidence is sufficiently compelling to require a further response from defendants.[6]

B. Plaintiffs' Mandamus Claims Do Not Expand the Scope of Review

With respect to plaintiffs' potential mandamus claim, *see* Mem. at 51, review under the mandamus statute—even if it existed in a case such as this one—should, at the very least, be no broader than review under the APA. As the Court has recognized, both the APA and the mandamus statute would be used for the same purpose: to remedy an alleged violation of FACA. Where it is available at all, mandamus is only available as an avenue of extraordinary relief, *see, e.g.*, *Chamber of Commerce v. Reich*, 74 F.3d 1322 (D.C. Cir. 1996); in cases where the "plaintiff has a clear right to relief," *Swan v. Clinton*, 100 F.3d 973, 977 n.1 (D.C. Cir. 1996); *see also Power v. Barnhart*, 292 F.3d 781, 784 (D.C. Cir. 2002) (reaffirming that mandamus is only available where plaintiff's right to relief is "clear and indisputable"); *Appalachian States Low-Level Radioactive Waste Comm'n v. O'Leary*, 93 F.3d 103, 112 n.9 (3d Cir. 1996) (indicating that standard for issuing mandamus is more stringent than review under *Chevron*); and only where a party "has exhausted all other avenues of relief. . . ." *Heckler v. Ringer*, 466 U.S. 602, 612 (1984).

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[6] In contrast, plaintiffs' plan would allow for the discovery of materials outside the record with no initial showing of need and based solely on the bare, unsubstantiated allegations of the complaint.

The requirements of clarity and exhaustion should bar discovery here insofar as mandamus is concerned, especially at this stage of the case. APA review should necessarily proceed first. If the administrative record does not contain evidence that plaintiffs are entitled to relief, and if plaintiffs do not come forward with new and material evidence on the membership issue, then there is no basis for mandamus review. Plaintiffs cannot be allowed to conduct a fishing expedition for some shred of evidence to rebut the administrative record. Consequently, review on the administrative record will necessarily be adequate to address plaintiffs' mandamus claims.

Indeed, it is counterintuitive to conclude that the "extraordinary remedy" of mandamus would entitle plaintiffs to *broader* review than they would receive under the APA. The D.C. Circuit has repeatedly indicated that requests for mandatory injunctive relief against federal officers should be analyzed as requests for mandamus. *See, e.g., Swan*, 100 F.3d at 976 n.1; *National Wildlife Fed'n v. United States*, 626 F.2d 917, 918 n.1 (D.C. Cir. 1980). Since review of a request for injunctive relief under the APA would be limited to the administrative record, a litigant should not be able to circumvent that limitation simply by asking for a writ of mandamus. If anything, mandamus here would require a standard of review *more* deferential to defendants, given the "separation of powers concerns" raised by plaintiffs' claim against the Vice President himself. *See* Mem. at 54 (recognizing these concerns).

Plaintiffs here seek to mandamus, not an agency official, but the Vice President of the United States—one of only two constitutional executive officers of the United States. Moreover, the subject of the mandamus

claim is not an agency action, but the composition of the NEPDG, a group whose membership was defined and limited by, and whose role was prescribed in, a written Memorandum from the President. Containing review to the administrative record is especially compelling in this case as the record contains the President's Memorandum embodying his choices regarding the structure, composition, and role of the group, as well as the group's submission in response to the President's directive. Albeit in a slightly different context, the court in *AAPS* recognized that, "[s]ince form is a factor," the government has a great deal of control over whether a particular group it establishes is subject to FACA. *AAPS*, 997 F.2d at 914. Consequently, as *AAPS* recognized, "it is a rare case when a court holds that a particular group is a FACA advisory committee over the objections of the Executive Branch." *Id.* This is not that "rare case." The record here makes it clear that the President defined and limited membership in the NEPDG in the written Memorandum establishing the group, and his choices regarding the structure, composition, and function of the group—and the response of that group, which consisted of officials at the highest level of the government and in direct proximity to the President—are entitled to the utmost deference.[7]

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[7] Some courts have indicated that "independent fact finding under mandamus is appropriate *in some circumstances*, even where agency action is under review," and that such independent fact finding can occur based on an administrative record. *See, Conservation Law Foundation of New England, Inc v. Clark*, 590 F. Supp. 1467 (D.C. Mass. 1984). *See also Commonwealth of Pennsylvania v. Nat'l Assoc. of Flood Insurers*, 520 F.2d 11, 26-27 (3rd Cir. 1975). For the reasons explained above, however, such independent fact finding would be highly inappropriate in this case.

Finally, allowing discovery to proceed against the Vice President would effectively decide the thorny constitutional issue of whether mandamus is precluded in this case, especially since the Vice President is not subject to the APA. The serious constitutional implications of permitting such a mandamus claim against the Vice President to proceed should therefore, at a minimum, compel the conclusion that independent fact finding apart from the proffered administrative record is inappropriate.

C. Record Review Should Be Limited at this Stage to the Membership Issue

As this Court's recent opinion held, "a court should not pass on any constitutional questions that are not necessary to determine the outcome of the case or controversy before it." Mem. at 53. By limiting the issue on summary judgment at this point to the inquiry of membership of NEPDG and its alleged subgroups, this Court can avoid any unnecessary inquiry into the internal workings of the NEPDG or its individual members and their supporting staff in carrying out the NEPDG's Presidentially-assigned mission (an inquiry defendants oppose, and one that is unwarranted and unnecessary to resolving this case on statutory grounds). Defendants anticipate the membership issue can be resolved expeditiously. This approach is appropriate for two principal reasons.

First, the Court has recognized that defendants "may prevail on summary judgment on statutory grounds" (*see* Mem. at 75) if the record demonstrates "no private individuals participated as members of the advisory committee at issue." *See id.* at 54. In that event, there will be no "need . . . to address the constitutionality of

applying FACA." *See id.* at 75. Similarly, as to any alleged subgroup, the absence of any non-federal member would be dispositive.

Second, requiring defendants to submit a factual record addressing their constitutional defense (which might require supplementation through appropriate declarations) would itself raise "constitutional issues." *See* Mem. at 75. For example, as the Court has suggested, some of the information relevant to defendants' constitutional defense is likely to encompass documents and other information subject to the constitutional privilege for presidential communications. *See* Mem. at 68-70 (discussing *In re Sealed Case*, 121 F.3d 729 (D.C. Cir. 1997)).

But even more significantly, requiring defendants to submit a record on the constitutional issues now (i.e., before the applicability of FACA is resolved), would force defendants to disclose—potentially unnecessarily—much of the same information plaintiffs seek on the merits (the very information defendants contend they cannot, consistent with the Constitution, be compelled to disclose). Indeed, plaintiffs seek through discovery far more than they would ever be entitled to under the FACA. FACA provides for notice of meetings, that such meetings be open, and that records of the advisory committee be publicly available to the extent not exempt from disclosure. Plaintiff, however, seeks through discovery information about communications between individual NEPDG members outside the context of meetings, between members and agency personnel, and between members and outside individuals.

Accordingly, defendants respectfully submit that, so long as the case may be resolved on statutory grounds, the Court, as a matter of law, comity and efficiency,

should minimize the requirement that the Executive Branch disclose information it contends is constitutionally protected from disclosure. *See* Mem. at 52 (acknowledging the "seriousness" of the constitutional issues). Defendants' proposal that review be limited to the membership issue accomplishes that objective without sacrificing this Court's fact-finding mission.

D. Review of the Membership Issue Should be Tied to the Legal Definition of Membership

FACA expressly excludes from the definition of advisory committee (and thus from the coverage of the statute) "any committee that is composed wholly of full-time, or permanent part-time, officers or employees of the Federal Government." 5 U.S.C. app. § 3(2). As explained above, defendants submit that the record (and review thereof) should be limited to the question of membership (i.e., whether any non-federal individuals were members of the NEPDG or any alleged subgroups). Defendants want to make clear, however, that "membership," for purposes of FACA, is by no means as broad a notion as plaintiffs suggest.

The D.C. Circuit in *Association of Am. Physicians and Surgeons v. Clinton*, 997 F.2d 898 (D.C. Cir. 1993) ("*AAPS*"), defined "membership" in an advisory committee: a nongovernment individual should be considered a member of an advisory committee only if "his involvement and role are functionally indistinguishable from those of the other members. Whether they exercise any supervisory or decisionmaking authority is irrelevant. If a 'consultant' *regularly attends and fully participates* in working group meetings as if he were a 'member,' he should be regarded as a member." *AAPS*, 997 F.2d at 915 (emphasis added). Consistent with this

definition of membership in an advisory committee, the *AAPS* court stated that "episodic meetings between government officials and a consultant" would not serve to transform the consultant into a member of the advisory committee. *Id.* "When an advisory committee of wholly government officials brings in a 'consultant' for a one-time meeting, FACA is not triggered because the consultant is not really a member of the advisory committee." *Id.*

In their proposed discovery, plaintiffs seek information about "meetings" attended by "all . . . persons who participated, in any manner, in the activities of the [NEPDG]," *see* Interrogatory No. 3, and further define the term "meeting" to include communications between any "two or more persons where [NEPDG] . . . activities were discussed." See Plaintiffs' First Set of Interrogatories at 2. Plaintiffs' notion of membership has no support in the law. The controlling definition of a FACA "member" as someone who "regularly attends and fully participates" in committee meetings (*AAPS*, 997 F.2d at 915) would exclude from FACA's scope any individual meetings between individual members of the NEPDG and non-government individuals. Under *AAPS*, such meetings can never rise to the level of regular attendance and full participation.

Moreover, any such individual meetings would not constitute committee meetings of NEPDG and would fall outside of the scope of FACA coverage. An advisory committee is covered by FACA only "when it is asked to render advice or recommendations, *as a group*, and not as a collection of individuals." *AAPS*, 997 F.2d at 913 (emphasis in original). It is the collective nature of an advisory committee's deliberations and recommendations that implicates FACA. *See id.* ("The

group's activities are expected to, and appear to, benefit from the interaction among the members both internally and externally."). As such, non-government individuals can be considered "members" of an advisory committee only if they regularly attended and participated in the collective decision-making processes of that advisory committee in a manner that is "functionally indistinguishable" from that of a formally appointed member. In this case, then, any sporadic contacts that may have occurred between individual members of the NEPDG and non-government individuals, outside of the context of NEPDG committee meetings, simply would not implicate FACA, and would therefore be outside the scope of any permissible discovery.[8]

The reason for this rule is simple. As *AAPS* recognized, extending the definition of membership to include sporadic meetings between government officials and non-government individuals would "achieve the absurd result *Public Citizen* warned against: reading FACA to cover every instance when the President (or an agency) informally seeks advice from two or more private citizens." *Id.*; *see also Public Citizen v. U.S. Dept. of Justice*, 491 U.S. 440, 452 (1989); *Nader v. Baroody*, 396 F. Supp. 1231, 1233-34 (D.D.C. 1975) (finding FACA inapplicable to episodic meetings between White House officials and various private sector representatives because "the Act was not intended to apply

[8] Nor are any such individual meetings, which are not addressed by FACA at all and which would be entirely proper, at all probative of whether a person did assume the role of a full member of the committee. Thus, even if discovery were permitted under either of plaintiffs' claims, plaintiffs' proposals are unjustified, intrusive, and unduly burdensome.

to all amorphous, ad hoc group meetings . . . or in any way to impede casual, informal contacts by the President or his immediate staff with interested segments of the population or restrict his ability to receive unsolicited views on topics useful to him in carrying out his overall executive and political responsibilities"); *American Soc'y of Dermatology v. Shalala*, 962 F. Supp. 141, 148-49 (D.D.C. 1996), *aff'd* 116 F.3d 941 (D.C. Cir. 1997) (finding FACA inapplicable to multispecialty physician panels convened by the Health Care Financing Administration, in part because the episodic contacts between government officials and the non-government panelists did not convert the non-government panelists into committee "members").

Accordingly, supplemental declarations filed by defendants will be consistent with the controlling definition of a FACA "member" as someone who "regularly attends and fully participates" in committee meetings. See AAPS, 997 F.2d at 915.

Because the APA frames the issues remaining in this case, APA review, limited to the administrative record, should frame the resolution of this case. Nevertheless, if, contrary to defendants' position, the Court should order discovery, that discovery must be "tightly reined," as this Court has held. Mem. at 74. Accordingly, it should be limited in scope to the issue of membership and further be limited as to form and to respondent.

As to form, discovery should be limited to written interrogatories. Interrogatories are the least intrusive means for providing information. Any such interrogatories ordered by the Court should be narrowly tailored to answer the question of membership without intruding into unnecessary areas of inquiry and without

requiring the participation of high-ranking government officials, including the Vice President and his staff and Cabinet members who served on the NEPDG.

Plaintiffs' discovery plan is unreasonably intrusive in the form of discovery proposed. In addition to interrogatories, plaintiffs have proposed broad-ranging document requests. While the overwhelming bulk of these requests do not relate to the membership issue, defendants note that plaintiff Judicial Watch already has received documents (as well as agency declarations) in the related FOIA cases.[9] Plaintiffs should be required to thoroughly examine the documents already in their possession before requesting further documentary evidence, most of which may well be duplicative. Indeed, in light of the extensive document production already provided to Judicial Watch in the FOIA litigation, plaintiffs should be required to justify any document request for agency documents before the Court orders defendants to respond to any discovery requests here.

Additionally, plaintiffs' plans to "notice appropriate depositions" should not be permitted. See Plaintiffs' Proposed Discovery Plan at 3. Any request for depositions plainly is premature at this time. Especially with respect to the high-ranking government officials who were participants in NEPDG, any deposition must await a showing that the information plaintiffs seek cannot reasonably be obtained through interrogatories and document requests. The courts have cautioned

[9] If the Court believes it would be helpful in fashioning an appropriate discovery plan, defendants can provide the Court with the relevant declarations, which in many cases address issues of membership, filed in the FOIA cases.

that, due to their greater duties and time constraints, agency heads "are generally not subject to depositions unless they have some personal knowledge about the matter and the party seeking the deposition makes a showing that the information cannot be obtained elsewhere." *Alexander v. FBI*, 186 F.R.D. 1, 4 (D.D.C. 1998); *Simplex Time Recorder Co. v. Secretary of Labor*, 766 F.2d 575, 586 (D.C. Cir. 1985) (holding that "top executive department officials should not, absent extraordinary circumstances, be called to testify regarding their reasons for taking official actions"); *Peoples v. USDA*, 427 F.2d 561, 567 (D.C. Cir. 1970) ("subjecting a cabinet officer to oral deposition is not normally countenanced"); *Wirtz v. Local 30, International Union of Operating Engineers*, 34 F.R.D. 13, 14 (S.D.N.Y. 1963) (Cabinet members should not be required to give depositions "unless a clear showing is made that such a proceeding is essential to prevent prejudice or injustice to the party who would require it.").

CONCLUSION

For all of the foregoing reasons, plaintiffs' proposed discovery plan should be rejected. Instead, defendants propose that any further proceedings be conducted in the following manner:

First, defendants will file an administrative record for NEPDG and any alleged subgroups on the question of membership. As explained above, this record will consist of the Presidential Memorandum establishing NEPDG, NEPDG's public report, and the Office of the Vice President's response to plaintiff Judicial Watch's request for permission to attend NEPDG meetings. Moreover, at the time defendants file the record, they will also file supplemental declarations specifically

addressing the membership issue with respect to NEPDG and any alleged subgroups.

Second, the Court should establish a schedule for briefing summary judgment on the membership issue once the record is filed by defendants. Defendants anticipate that this entire process—compiling the record, submitting the record, and briefing—can be accomplished expeditiously. Defendants can submit the administrative record, and their summary judgment brief, by September 9, 2002. Once briefing on summary judgment is complete, the Court can decide this potentially dispositive statutory issue.

Dated: July 29, 2002

Respectfully submitted,

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CA-02-631

SIERRA CLUB

v.

VICE PRESIDENT RICHARD CHENEY, ET AL.

TRANSCRIPT OF STATUS HEARING BEFORE THE
HONORABLE EMMET G. SULLIVAN
UNITED STATES DISTRICT JUDGE

Washington, D.C.
Aug. 2, 2002

APPEARANCES

FOR THE PLAINTIFF:

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CRAIG BLACKWELL
SHANNEN W. COFFIN, ESQ.

[4]

THE DEPUTY CLERK: Civil Case 01-1530, Judicial Watch, Inc. vs. National Energy Policy Development Group. Counsel, would you please identify yourselves for the record.

MR. KLAYMAN: Larry Klayman, Counsel for Plaintiff.

THE COURT: Good morning, Counsel.

MR. BOOKBINDER: David Bookbinder, Counsel for Plaintiff Sierra Club.

MR. ADELMAN: Roger Adelman, Local Counsel.

MR. ORFANIDES: Paul Orfanides, Judicial Watch.

THE COURT: All right, good morning.

MR. BOOKBINDER: Your honor, one thing. I believe on the phone is Alex Levinson from the Sierra Club in San Francisco.

THE COURT: All right, good morning, Counsel. He's not there yet. All right, we'll get him on in just a second.

Good morning. Hello?

All right, why don't you keep trying? We'll get him on soon.

Hello?

MR. LEVINSON: Yes.

THE COURT: Good morning, Counsel.

MR. LEVINSON: Good morning, your honor. This is Alex Levinson.

[5]

THE COURT: All right.

And for the government?

MR. COFFIN: Your honor, Shannen Coffin, Deputy Assistant Attorney General, Civil Division. With me is Anne Weismann, Jennifer Paisner, and Craig Blackwell.

THE COURT: All right, good morning.

Unlike the last case, there's no one smiling in this case.

MR. KLAYMAN: We're smiling, your honor.

THE COURT: You're smiling? All right, you're now smiling.

MR. KLAYMAN: Yes, we're smiling.

THE COURT: That's good.

All right, I'll hear from plaintiffs' counsel. I've reviewed your plans. Is there anything in addition to the proposed discovery plan that you wish to say?

MR. KLAYMAN: Yes, your honor.

THE COURT: All right.

MR. KLAYMAN: Your honor, Larry Klayman for Plaintiff Judicial Watch.

THE COURT: Good morning, Counsel.

MR. KLAYMAN: Good morning.

I'm just going to hit the highlights. I'm not going to belabor the points, because we set forth in the briefs [6] exactly what we feel the discovery plan should be. But your honor's order, which was very well thought out and very well reasoned, at page 52, really set forward the parameters of discovery, wherein you stated, resolving the constitutional questions, the issue of separation of powers, which has been raised by the

Defendants in this case, is premature at this stage of the proceedings. The government would have this court answer the question in the negative now and submit the case without ever providing any discovery into the nature and number of the meetings at issue, the identities of the participants, the nature of the group's interaction with the president, the role of the vice-president in the group, the nature of the alleged subgroup's interaction with the National Energy Policy Development Group, or the proximity of the, what I'll call the Cheney Energy Task Force and alleged subgroups to the president.

You set forth the parameters for discovery on page 52, your honor, and you added at page 70, *In re Sealed Case* makes clear that determining how far down the line the advisers' constitutional protection should extend in the context of balancing the needs of the executive branch and congress will be a fact-intensive inquiry. A fact-intensive inquiry determining who participated in the deliberations in the Cheney Energy Task Force and the alleged subgroups, whether in fact those subgroups existed and who interacted with the private [7] individuals involved, the role played by private individuals, and the number of meetings and interactions will affect this court's determination of the impact that revealing such activities to the public would have on the president's ability to perform his executive functions.

Furthermore, the role of the vice president in the Cheney Energy Task Force is to be determined. The fact that the vice president was tasked with leading the Cheney Eenergy Task Force does not mean that, in fact, he participated in all aspects of the task force or the meetings of the alleged task force subgroups.

Your honor then stated at page 74, any potential intrusion into the president's constitutional authority that occurs because a specific request for documents or information during the course of discovery must be analyzed as a conflict between the needs of the executive and judicial branches and will involve the application of different precedent.

So your honor was very, very precise in terms of how you wanted discovery to proceed here, and you set forth those parameters. The Plaintiffs in this case, Judicial Watch and Sierra Club, were very deferential to your honor's ruling, and we suggested starting with document requests and interrogatories which were tailored exactly to your order. It goes no further than your order.

However, rather than obeying your order, the [8] Defendants would want to reargue all the issues here, and they want to go down the primrose path of the AAPs decision, the health-care task force decision, with affidavits, and actually that's just going to create more work. It's going to slow things down. It's inappropriate because, obviously, we need the ability to get free-flowing information by witnesses themselves, not by lawyers. Affidavits are written by lawyers. The interrogatory responses are written by lawyers. But we just want to start with the documents and the interrogatories and see what they show, and then we'll come back to your honor and propose who, if anyone, should be deposed in this case.

Clearly, the approach that's being proposed by the Defendants, the Cheney Energy Task Force, is the type of bunker mentality. It's the type of an approach that we are above the law. We're above your honor's order. We don't have to answer questions. We'll put

forward what we want to put forward and nothing more. But your honor's already ruled and, consequently, this hearing is very straightforward. We have not asked for more than your honor ordered, and, in fact, we've taken a go-slow approach here, which we thought your honor would want us to do under the circumstances.

So, for that reason, we're confident your honor will allow us to serve the interrogatories and document requests to get this preliminary information within 30 days. This is a matter of great public interest. The energy task force is no [9] more immune from discovery than any other citizen or entity in this country, and we've already been through a lot of briefing here and a lot of analysis. Your honor did a very fine job in breaking down what the issues are at this stage of the proceeding, and for your honor to be able to make the rulings with regard to the various constitutional arguments, at a minimum, we need this information.

So that is our proposal: Document requests and interrogatories that fall within the scope of your order. Let's see what they yield. We'll then come back to the court and make a proposal and what, if any, depositions are necessary.

Thank you.

THE COURT: All right, thank you.

Anyone else?

MR. BOOKBINDER: Your honor, I think we would like to hear the government's explanation for their position before Sierra Club has anything further to add.

THE COURT: All right.

I'll hear from government counsel.

I gave the government a chance to provide the court with precise objections, and the government didn't take advantage of that opportunity.

MR. COFFIN: Your honor, our objection is general, and let me explain it. I think that the resolution of the [10] remaining issues in this case has to flow from your opinion, your opinion which held several things.

First, the resolution of the remaining issues have to be a tightly-reined process, and this call for narrowly-tailored factual resolution flows from two different related notions of constitutional avoidance. First, the one that your honor noted in the opinion, the resolution of the remaining issues, may be framed in a way designed to avoid unnecessarily deciding constitutional questions prematurely. I think we had issues with that at the time, but we certainly are willing to work with that notion in a discovery plan at this point and, or I should say in opposing the discovery plan at this point.

THE COURT: Well, essentially, the government's position is that you didn't file objections because no discovery is appropriate.

MR. COFFIN: Your honor, we believe that the APA frames a resolution of this case and—

THE COURT: Did I correctly say what the government's position is?

MR. COFFIN: I think at the beginning of our brief we say we object generally because this is an APA case, and in an APA case, the resolution of the case has to flow from the administrative record.

THE COURT: The government says, this is the record because we say it is the record and accept it, and you get no discovery.

MR. COFFIN: I think

THE COURT: Wait just a minute. Don't cut me off.

This is the record because we say it's the record, and no one is entitled to discovery because this is APA review. Discovery is frowned on. So, grant us summary judgment. I meant, that's the scenario.

MR. COFFIN: Your honor, that is APA review that you just explained. With all due respect, let me explain the basis for APA review in this case.

THE COURT: So the government wins because the government says, this is what happened. We say this is what happened, and no one can question what happened, and no one can even look into what happened.

MR. COFFIN: There was a decision made here. Both Judicial Watch and Sierra Club wrote letters to the government saying, for the following reasons, we believe FACA applies. We think you met with outsiders, etc. And the government made a decision that said, no, FACA does not apply, and as articulated in a letter that memorialized that decision from David Addington to Judicial Watch, they said the reason it doesn't apply is because there were no members, there were no members who were non-governmental employees.

I think that you have to start with the administrative [12] record that backs up that decision, and the administrative record that backs up that decision, first and foremost, is the memorandum that established the committee. Let me explain why that is so important, because, as in all decisions, all the disputes involving governmental decisions, there is a presumption of regularity, that the government complied with the law.

THE COURT: Wait. But if you're correct, it means that no one will ever have the opportunity to go behind the memorandum that creates the FACA Group and determine whether or not there was compliance with the law, if you're correct.

MR. COFFIN: Your honor, the presumption of regularity means this. We are very willing in this case, through sworn declaration, to confirm that the memorandum was followed, that regularity was the case here. Plaintiffs then should release all the information that they have publicly available, including all the FOIA documents that are out there. They should be required to come forward with something that rebuts that presumption of regularity.

Here, there is absolutely no evidence that Plaintiffs have put forth that anyone but governmental officials participated in the meetings of the NEPDG, and that is because the president said, you have to comply with my wishes, and it is only governmental employees that can be, government officials, I should say, that can be invited.

[13]

THE COURT: How do we know that everyone complied with the president's wishes?

MR. COFFIN: Your honor, again, the administrative record will back that up, and we are prepared to offer a declaration that confirms that. But unless Plaintiffs are willing to come forward with some shred of evidence that says that that is not the case, then, yes, this case should be over.

I think, I mean, I think in an APA review, it is possible for us to supplement the record to fully explain our reasons. I think *Camp v. Pitts* allows that, and we are

fully, we are willing to explain the rationale behind David Addington's letter to Judicial Watch that says FACA doesn't apply. We're willing to explain that, in fact, government officials were the only ones who participated in the meetings of the NEPDG.

THE COURT: Normally, as a general proposition, I would agree with you. In APA cases, discovery is normally frowned upon. The remedy is to remand to the agency, and if there's a need to supplement, then someone can prepare a supplemental record so that the court can review that record as opposed to embarking on discovery. But this case isn't the typical case, where you have a significant administrative record out there. I mean, you alluded to the memorandum that creates the subgroup, and that's it.

MR. COFFIN: The report of the president also confirms [14] the membership. On page five of the report, it says, here are the people who sign off on this report, because they're the ones who participated in its preparation. These are the members of the NEPDG de facto. So there is, in fact, an administrative record here.

And also, I mean, it's the facts that were relied upon by the decision-maker in saying FACA doesn't apply. Now, there may not be documents out there that back that up, but that's the purpose of the supplemental declaration here, to confirm in fact when we made this decision, we did so because in fact no one had attended these meetings and participated in the meetings themselves except governmental employees. So we're willing, your honor. I will freely admit that this is not your standard APA.

THE COURT: Absolutely. I appreciate that concession. Absolutely.

MR. COFFIN: Your honor, I don't think it's a concession. It's still an APA case. It's just not—

THE COURT: Well, why are you backpedaling from your admission? You're absolutely correct, and I think everyone in this courtroom agrees with you it's not the typical APA review at all.

MR. COFFIN: That's because you said—

THE COURT: Don't backpedal from it. I'm just applauding your concession.

[15]

MR. COFFIN: I'm saying it's not your standard APA review. I'm not saying it's not your APA-review case. It is, and that is because there was a conscious decision made by the government that FACA doesn't apply, because the president directed the composition of the group and the group complied with that composition. And when Judicial Watch and Sierra Club said, please comply. Please give us access. Please give us your documents and access to the meetings, the government said no, because in fact the facts before it were that no one had been involved in the meetings except the governmental officials. That's the purpose of a supplemental declaration in this case, and that's—

THE COURT: You would agree with me, also, that the law is not always complied with. Correct? People violate laws, unfortunately, every day.

MR COFFIN: Your honor, however, there is a strong presumption that the government complied with the law, and that is—

THE COURT: But the government doesn't always comply with the law.

MR. COFFIN: Your honor, I will admit there have been instances where that is the case—

THE COURT: Many instances.

MR. COFFIN: — But that presumption has to frame the inquiry here. If the government is coming forward and saying [16] in a sworn declaration that is part of the, quote, administrative record in this case that the law was complied with, because there were, I think what's out there right now, as far as I understand it, there were nine meetings, and that in each of those nine meetings only governmental officials were involved, then that presumption of regularity requires the Plaintiffs to come forward and say, but there's evidence out there that shows you didn't comply. And until we're able to put in a declaration and to file summary judgment and to frame these issues for you, and until they can come forward with some evidence that rebuts that, then I think that this case can't be resolved properly under the APA.

THE COURT: What you're suggesting, though, is that no one can conduct a reasonable investigation, reasonable discovery, in an effort to determine whether the law was complied with. That's all they're trying to do, to see if the law was complied with.

MR. COFFIN: I think they have a threshold burden here—

THE COURT: All right.

MR. COFFIN: —To rebut the presumption of regularity, and that threshold burden, if it can be rebutted, your honor, it should be able, they should be able to

rebut it through the information that is already out there. Judicial Watch has made FOIA demands, and they've been processed [17] entirely, I believe, except for, you know, documents that have been—

THE COURT: The document requests have been produced by the government which may be relevant in this case?

MR. COFFIN: Oh, absolutely, the document requests, the FOIA requests related to the operation of the NEPDG.

THE COURT: So there is relevant information out there?

MR. COFFIN: Yes.

THE COURT: That focuses on this inquiry?

MR. COFFIN: Yes. And in the FOIA cases, we've also put forward declarations that have explained each agency's operations within the NEPDG. So there is a lot of information out there, and what Judicial Watch—

THE COURT: Separate and apart from the administrative record?

MR. COFFIN: Oh, yes. No, I'm saying there's something from which—this is—I mean, in my mind, the presumption of regularity here says that they should look at all of that information, and if they can come forward with some evidence that someone, you know, a non-governmental official regularly participated in the meetings.

THE COURT: Well, that's all they want the opportunity to do. They're going to take that information and look through it and cull through it, but discovery is an ongoing process. [18] They want to look at other

information that may well lead to other discoverable information.

MR. COFFIN: But there was an administrative decision here, and the administrative decision is backed up by an administrative record that we're willing to supplement with that information and the information that they have here. If they can't show—

THE COURT: Why hasn't the government already supplemented that record up to this point? This case has been ongoing since last July. Why didn't they?

MR. COFFIN: Your honor, we haven't moved for summary judgment in this case. That's the only reason.

THE COURT: All right.

MR. COFFIN: We moved to dismiss—

THE COURT: Which was your right to do.

MR. COFFIN: —and we thought the case would be resolved on those issues.

THE COURT: I'm just asking the question. I'm not being critical.

MR. COFFIN: I think that's the reason. But, you know, I think it's important that your honor understand the difference between supplementation and discovery. I mean, as you know—

THE COURT: I'm well aware of the difference.

MR. COFFIN: Okay, and the case—

[19]

THE COURT: That's why I'm convinced that discovery will go forward, because there's a need, there's a crying need for discovery in this case.

MR. COFFIN: Your honor, the case that they cite, *AMFAC Resorts*, actually supports that.

THE COURT: Supports what?

MR. COFFIN: Supports the fact that discovery is not the norm in APA cases absent some showing.

THE COURT: I totally agree with you. In the typical APA case, it's not, but you've agreed with the court that this is not the typical APA case.

MR. COFFIN: Well, this is an APA case, your honor. Unless, unless the Plaintiffs or the court can articulate an accepted reason for varying the APA review in this case, then APA review has to be on the record, and there has been no strong showing of that bad faith or improper behavior, and in a case like this, discovery is simply improper.

THE COURT: Even though, as you recognize, this is not the typical APA case.

MR. COFFIN: Your honor, saying that this is not the typical APA case is not saying that this is not an APA case. The reason this is not a typical APA case, your honor, is that the threshold determination here is that the statute that the Plaintiffs are seeking on this relief here doesn't apply in the first instance.

[20]

THE COURT: What about the request for mandamus relief?

MR. COFFIN: Your honor, we don't think that changes the determination here at all. Mandamus is an extraordinary remedy. Your honor, you haven't decided whether mandamus applies here, because, as

you noted, there are constitutional issues that relate to mandamus.

THE COURT: Why aren't they entitled to some discovery, though, in an effort to convince me that mandamus may apply in this case?

MR. COFFIN: We would say that because it is a drastic remedy that's invoked only in extraordinary circumstances, where there's a clear and indisputable right, that unless the information that's out there, including the declaration that would be part of the administrative record and all the FOIA information shows some inkling of a right, no, they're not entitled to discovery to supplement that.

And, your honor, on the subject matter of the inquiry, because of your concerns with avoiding unnecessary constitutional questions, because of our concerns with disrupting the effective functioning of the presidency and the vice-presidency, we have proposed that we answer one question here, and that is one of the threshold questions that your honor posed in his opinion. That is the question of membership, and our APA declaration would focus on membership [21] in the group and it would confirm—

THE COURT: Are you prepared today to tell the court who the members of the group were?

MR. COFFIN: Your honor, it's my understanding—well, I'm sorry. Who they were?

THE COURT: I thought you said you were planning to file some sort of declaration to inform the Plaintiffs and the court who the members of the group are or were.

MR. COFFIN: Right. Your honor, we will do that.

THE COURT: Are you prepared to tell the court today who those people are?

MR. COFFIN: Well, I can read you the presidential memorandum

THE COURT: No, no. That's already a part of the record.

MR. COFFIN: —That establishes the group.

THE COURT: Are there any additional members?

MR. COFFIN: Yes. I think the director of the

(Pause)—

THE COURT: Who are the additional members?

MR. COFFIN: I'm explaining. The director of the OMB was a member. The vice-president had the authority to invite any governmental officials, any governmental officials to participate, I believe he extended that invitation to the Director of the OMB, who was not named by the president. There [22] was one other governmental official. Whether it was—I think the Secretary of State was an optional member. He may have been invited, but I'm not certain of that. But I am certain that as far as we understand the facts, which we would be willing to explain, that only governmental officials were involved. So it is the membership that was named by the president, with the invitation extended to the OMB Director to also participate.

THE COURT: And that's the complete list?

MR. COFFIN: Your honor, that is certainly what our declaration will show. That's my understanding, that that is the complete list.

THE COURT: So that's a complete list of participants?

MR. COFFIN: Yes, your honor. Those are the, those are all the members of the NEPDG, those who we are, we would show in the declaration. That declaration can be prepared, I think, fairly readily, within a few weeks, and we could proceed to summary judgment, I would think, within a month.

THE COURT: Why hasn't the government shared that information with the public up to this point?

MR. COFFIN: Your honor, the government has shared that information. There was a letter to congress, to Representative Waxman, from—I think it was actually an issue in one of our earlier hearings about that letter, but it did explain the membership. So that membership has been explained. [23] We would simply confirm that in a declaration, your honor.

And so, your honor, those are, that's the outline of an approach we would take, because this is an APA case. If, say, over our objection, you decide you'll allow, discovery in a non-APA setting, we would suggest, reluctantly, that you look to *Nader v. Baroody* for the framework of that. That is, in that case, Judge Gesell said we'll limit you to, the inquiry could be answered through the FOIA requests and through written interrogatories. So that is our, the alternative.

THE COURT: What about non-governmental-witness depositions?

MR. COFFIN: Your honor, non-governmental-witness depositions? If there were such depositions, we would certainly wish to be present. We would seek to preserve—

THE COURT: You're entitled to notice.

MR. COFFIN: —any privilege.

THE COURT: And invoke the privilege on behalf of the non-governmental witnesses?

MR. COFFIN: Invoke the privilege on behalf of the United States, your honor. The privilege, the privilege of executive communications belongs to the executive. But, your honor, as far as—

THE COURT: So if those witnesses were deposed, the government would attempt to invoke executive privilege?

MR. COFFIN: I don't know, your honor. I'm just [24] saying we would preserve the right. We would reserve the right to participate in any such deposition.

THE COURT: No, you're entitled to notice.

MR. COFFIN: And we would, but I want to make clear, our objections are to depositions in toto. We believe that this can be accomplished through written interrogatories that are sworn, and that should be the end of the story.

THE COURT: You may be correct. We're not going to focus on depositions today, but the court's not going to rule out the possibility of governmental officials being deposed, as well as non-governmental officials being deposed, but I'm not going to focus on depositions today.

MR. COFFIN: Your honor, let me just make one more point. I would suggest that, even though you have doubts about our plan, to allow it to go forward and then handle any objections at that point.

THE COURT: I've already invited the government to file objections. The court has again, and this is not the first time the government was invited, that the court has invited the government to frame appropriate constitutional objections. I did that during the briefing schedule, and the government chose not to do so, and in this case I said to the Plaintiffs, submit your proposed discovery—

MR. COFFIN: Your honor—

THE COURT: Just a minute. Don't interrupt me. [25] I told the Plaintiffs to submit a proposed discovery plan, and Plaintiffs did so. And I told the government, if you have precise constitutional objections, let me know what they are so I can determine whether or not this plan is appropriate, and, you know, essentially, you said, well, it's unconstitutional, without elaborating. You said, because Plaintiffs' proposed discovery plan has not been approved by the court, the Defendants are not submitting specific objections to Plaintiffs' proposed request. Well, there again, the government changes the rule. My rule was, if you have objections, let me know what the objections are, and you chose not to do so.

MR. COFFIN: Your honor, you asked us to object to the discovery plan, which is what we have done. We did not choose to offer written objections to their written discovery because you haven't approved the discovery plan.

THE COURT: Well, I'm going to approve it today. Discovery will go forward. So if there are objections, you can be precise and file your objections. Discovery is going to go forward. Anything further, counsel?

MR. COFFIN: No, your honor.

THE COURT: All right, I'll hear from Sierra Club.

MR. BOOKBINDER: Your honor, we'll be very brief. I think we've heard enough from the government on this [26] issue. I just want to say two things. One is—

THE COURT: Apparently, you would like to hear more, because you want to conduct discovery.

MR. BOOKBINDER: I meant in terms of their response to our discovery plan. One thing that became apparent is, now the government seems to be conceding there was a decision or determination made that FACA didn't apply at some point, which is interesting, because the government has argued repeatedly that there was no action, there was no final agency action, there was no determination made at any point, but now we have agency action conceded by the government. The second thing is that any administrative record would consist, obviously, of all the evidence that was, all the materials, all the documents, all the notes, all the minutes as to who participated, the exact same stuff that we're seeking in discovery, and finally the government stood here and said, as your honor pointed out, there is additional written material that they claim to have produced under FOIA which is relevant to this issue that they're not putting in the administrative record. So I don't understand what their version of the administrative record is. The last thing, your honor, is, we have already encountered claims of constitutional privilege in Defendants' answers to our complaint, which were just filed. I've never [27] seen a situation where an answer to a specific factual allegation contains, we refuse to answer on the ground of constitutional questions, and I'm not sure how Plaintiff should —I've never heard of facts being constitutionally privileged.

THE COURT: I have to ask the government whether or not the government has, indeed, invoked executive privilege, then, in its, answer.

MR. COFFIN: Your honor, there are points in the complaint where we will, we have refused to answer on the ground of (pause)—

THE COURT: Executive privilege?

MR. COFFIN: —On the ground that, yes, on the ground of privilege, on the ground of constitutionally protected communications, and, you know, we can deal with that in that process. But, yes, we have.

THE COURT: That's fine. I mean, if you wish to assert the privilege, that should be done clearly. Is that what you have done in your answer, then, asserted the executive privilege?

MR. COFFIN: Yes, your honor.

THE COURT: All right.

MR. BOOKBINDER: That's all, your honor.

THE COURT: All right.

All right, anything further, counsel?

[28]

MR. COFFIN: No, your honor.

THE COURT: All right, I'm going to take a five-minute recess.

Anything further, Mr. Klayman?

MR. KLAYMAN: No, your honor.

THE COURT: All right.

(Recess)

THE COURT: All right, counsel, I'm going to approve the proposed discovery plan that the Plaintiffs have submitted. It requires answers to interrogatories. It requires production of documents.

Let me just say one thing. I can see where all this is leading to. It's leading to more briefs, potentially constitutional issues. That's fine. That's well. If you want to assert privilege, then you may do so in the appropriate manner. But just to pick up on something that government counsel said at the podium, it may well be that the government's position is that it has produced in other lawsuits, pursuant to other requests, FOIA requests primarily, information that may be relevant in this case. The government cannot simply say it's already produced that information, whatever that information is, without providing the Plaintiffs and, indeed, the court with some detail, with some particularity, so that the court and the Plaintiffs know exactly what documents the government is referring to. So you [29] can't just simply say, we've already produced that information.

So I'm just giving you a heads-up on that, counsel. Although I don't think you would do that, it's very important. If it's the government's position that this information has already been produced in another forum, then it has to say in detailed particularity just what that forum is and what that information is.

I'm going to—well, let me just hear from Plaintiffs. I've approved your proposed plan, and when I say that, I recognize that there may be legitimate objections to the plan that raise constitutional concerns and that raise concerns of executive privilege. If so, we'll address those objections and concerns at the appropriate

time. When do you plan to propound your interrogatories and requests for document production?

MR. KLAYMAN: Your honor, we can do it today.

THE COURT: That's fine. You can do it anytime you want to.

I'll give the government 30 days from the date that the document request is propounded and 30 days from the date answers to interrogatories are propounded to file objections in the appropriate manner, and if the government asserts privilege with respect to a request for document production or interrogatory, then the government is going to have to, with precision, tell the court and tell the parties just exactly [30] what the basis of the objection is.

In other words, it's not appropriate to say executive privilege without more. It's not appropriate to say this request is unconstitutional, or pursuant to the constitution, no response is required. That's not appropriate. I need to know, for the third or fourth time, what the basis is for either a response saying this is protected by privilege or this intrudes upon some constitutional protections that should not be intruded on, and I'm not going to sit up here and tell the government how to respond to discovery. There are excellent attorneys at government counsel table. They know exactly what should and should not be done.

MR. KLAYMAN: Your honor, if I may propose a suggestion here.

THE COURT: Sure.

MR. KLAYMAN: The government has already had a good period of time to register its objections, as the court noted, to our discovery. That's why we actually

gave them an advance look at discovery, not just a plan, but we gave them the actual discovery. They have not done so. The way the case is usually run in this kind of a case when there's a matter of great public importance involved, when the government perceives a political downside to the production of documents, and that's obviously the case here or they wouldn't be fighting the way they are—

[31]

THE COURT: I'm not going to get into that. I don't know that to be the case.

Anyway, go ahead.

MR. KLAYMAN: At least from my perspective, and there was an admission made that they will produce some documents in other cases. What's before you here and what's different about this case from the other cases is that we're seeking the documentation at the core of the Energy Task Force right out of the White House. Those document requests that were propounded and FOIA requests were peripheral. They were in government agencies.

So what I'm proposing is, since they've already had some time to make objections, and they've obviously thought about what those objections would be in any event, to set a shorter time to make the objections—ten days, perhaps—so we'll know where we stand, to not let 30 days tick off and we'll lose all that time, because this is a matter of great public importance.

THE COURT: No, I recognize that. I recognize that time is a factor.

MR. KLAYMAN: That way, we can come in, if we disagree with those objections, and say, your honor, can you adjudicate that so we can have time for production?

Secondly, we would like a commitment from the government that they're not going to hang back to the end of 30 [32] days and then say, okay, we have this problem. You know we need another 30 days or another 60 days. This is the way it usually happens in these kinds of cases. We'd like to get an indication up front of what their problems are, if any, in the next ten days as they make their objections, so the court can address them, because the public is wanting to know what went on.

There was a statement made here that the Secretary of State was likely a member of the committee, the Task Force. The issue of how the energy policy affects even our Middle-Eastern policy is a matter that the public deserves to know about in terms of how this task force was constituted. We want to get the information out. That's our desire. As you know, at Judicial Watch, we don't take a position on energy policy. That's not our policy. We just want to get the information out to the American people.

So I suggest that—

THE COURT: I understand your concerns, and time is a concern of the court as well. I understand that. I'm going to give the government 30 days, though. Recognizing that the government has already had a significant amount of time to consider the proposed—questions and proposed document requests, it's not unreasonable at all to give the government until the 3rd of September to file, either comply with the request or

file its very detailed objections to document requests and/or [33] interrogatories.

And the reason, another reason for giving the government more time than less time is because I'm not inclined to extend that time, now, recognizing the government has already had an opportunity to consider the request for a significant period of time. So the 3rd of September is the date that the requests are due to the Plaintiffs' request for production of documents, as well as any answers to interrogatories.

And what I'm going to do, I don't know whether—

MR. COFFIN: Excuse me, your honor.

THE COURT: Yes.

MR. COFFIN: That assumes that Judicial Watch will file its request today.

THE COURT: Today. That's correct.

I'm going to—do you plan to do it today or tomorrow?

MR. KLAYMAN: Judicial Watch and Sierra Club will serve them today.

THE COURT: All right, that's fine.

This case is one of the electronic-case files, anyway, so it can be done electronically. That's only fair, to give the government until September 3rd, but I will not extend the time.

Now, I anticipate that there's going to be a need for [34] additional briefs to be filed. You know, I'm not ruling out the possibility of appointing someone to monitor discovery. I have a feeling that the objections and the responses to discovery could take an enormous amount of time of this court to resolve. So I'm not

ruling out the possibility of appointing maybe a retired judge to assist the court with managing discovery. To the extent that I can do it myself, I'll try to do it myself. But if it becomes too much of a drain on my time—this is not the only case on my calendar—then I will take appropriate action and appoint maybe even a magistrate judge or maybe even a retired federal judge to assist the court with monitoring discovery. But I'll try to do it myself for the time being.

I think it's appropriate to schedule a status hearing, yet still another status hearing now. I'm going to give the court a couple of weeks to—actually, I'm not going to need much time. I want to consider the objections that, I'm sure, will be filed to the requests for production of documents, as well as to questions. I do want to consider those so that I can then determine what's an appropriate briefing schedule to brief legal issues that will flow from the answers. I recognize time is a factor in this case.

How about Friday, the 13th, at ten o'clock?

MR. KLAYMAN: The perfect day, your honor.

THE COURT: All right, and that's for purposes of [35] putting in place an appropriate briefing schedule. I'm sure that one is going to be required in this case.

All right, anything else that we have to focus on today?

MR. BOOKBINDER: No, your honor.

THE COURT: All right, it's good to see everyone. You're not smiling. Everyone is frowning.

It's good to see everyone.

MR. KLAYMAN: Thank you, your honor.

THE COURT: Have a nice day.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No.: 01-1530 (EGS)

JUDICIAL WATCH, INC., *ET AL.*, PLAINTIFFS

v.

NATIONAL ENERGY POLICY DEVELOPMENT GROUP, *ET AL.*, DEFENDANTS

SIERRA CLUB, PLAINTIFF

v.

VICE PRESIDENT RICHARD CHENEY, *ET AL.*, DEFENDANTS

PLAINTIFFS' FIRST REQUEST FOR PRODUCTION OF DOCUMENTS

Plaintiffs hereby request, pursuant to Rule 34 of the Federal Rules of Civil Procedure, that defendants identify and produce the documents described below at the offices of the Sierra Club, 85 Second St. 2d Fl., San Francisco, California, 94104, on 9/3/02, 2002, at 10:00 a.m. for inspection and copying

INSTRUCTIONS

1. The documents shall be produced by category as designated in this request, and each document shall be produced in such a fashion as to indicate clearly the identity of the file in which it was located. All documents are to be produced as they are kept in the usual course of business, so that plaintiff can ascertain the

files in which they were located, their relative order in the files, and how the files were maintained.

2. This document request extends to all documents in the possession, custody, or control of defendant and its agents, including, without limitation, documents located in all offices of defendants that were involved in the activities of the National Energy Policy Development Group or preparation of the National Energy Policy Report.

3. If you object to the production of any of the requested documents on the basis of privilege, you shall submit for each document, in lieu of it, a written description that:

a. identifies the date of the document;

b. identifies the author or source of the document;

c. briefly describes the nature of the document (e.g., letter, memorandum, handwritten note etc.) and the general subject matter of the contents of the document;

d. identifies the Person to whom the document was addressed, and each Person who received a copy of it; and

e. lists any objection raised or privilege claimed and its basis.

If any portion of a document for which you claim a privilege contains non-privileged information, you must produce the document but you may redact any allegedly privileged portion.

4. Any document, notation, or marking appearing on any document, and not a part of the original, is to be considered a separate document, and any draft, preliminary form, or superseded version of any document is also to be considered a separate document.

5. If any document required to be produced by this Request for Production has been destroyed, identify such document by:

a. author or preparer;

b. addressee and all other recipients

c. indicated or blind copies;

d. date;

e. subject matter(s);

f. number of pages;

g. attachments or appendices;

h. all persons to whom it was distributed, provided, shown or explained;

i. date of destruction;

j. manner of destruction;

k. reasons for destruction;

l. person authorizing destruction; and

m. person destroying the document.

6. If any document required to be produced by this Request for Production is withheld because it is stored electronically, identify the subject matter of the document and the place or places where the information contained in the document is maintained or stored.

7. Whenever the word "and" appears, the word shall include "or" and shall be the logical inclusive of "and/or."

8. The singular includes the plural, and the plural includes the singular.

9. Pursuant to Rule 34(b), F. R. Civ. P., these requests are continuing in nature and defendants are required to produce all responsive materials that come into their possession, custody or control after the date of their initial response.

DEFINITIONS

A. "Document" means and refers to, without limitation, all written, typed, or otherwise preserved communications including any letter, memorandum, diary, log, test, analysis, study, projection, check, invoice, receipt, bill, purchase order, shipping order, contract, lease, agreement, work paper, calendar, envelope, paper, telephone message, tape, computer tape, computer disc, computer card, other electronic media, electronic data active files, electronic data archived files, electronic data backup files, electronic file fragments, recording, videotape, film, microfilm, microfiche, drawing, account, ledger, statement, financial data, and all other writings or communications including all non-identical copies, drafts, and preliminary sketches no matter how produced or maintained in your actual or constructive possession, custody or control or of which you have knowledge of the existence, and whether prepared, published or released by you or by any other person or entity. Without limitation, the term "document(s)" shall include any copy that differs in any respect from the original or other versions of the document, such as, but not limited to, copies containing notations, insertions, corrections, marginal notes, or emendations.

B. "Person" means and refers to, without limitation, any individual, corporation, partnership, joint venture, limited partnership, association, trust, trustee, group, organization, government or government agency, office, bureau, department, or entity, and all divisions, sub-

divisions, bureaus, branches, offices or other units thereof, and includes the present and former officers, executives, partners, brokers, employees, agents, and all other persons acting or purporting to act on behalf of them, and any of their present or former parent corporations, subsidiaries, affiliates, divisions, predecessors and successors in interest.

C. "Communication" means and refers to any use of any mode of conveying meaning or information such as, but not limited to, speech, telephone, telegraph, e-mail, other computer-generated or transmitted information, letter, and any written or spoken language for the purpose of transferring information from one person or place to another. The term "Communication" shall include, without limitation, any oral, written or electronic transmission of information including, without limitation, meetings, discussions, conversations, telephone calls, memoranda, telecopies, telexes, conferences, facsimiles, seminars, messages, notes, or memoranda.

D. "Any" encompasses "all."

E. "Concerning" means and includes referring to, relating to, alluding to, responding to, connected with, commented upon, in respect of, about, regarding, discussing, involving, showing describing, reflecting, and constituting.

F. The "Task Force," means and refers to the National Energy Policy Development Group, as described in President George W. Bush's memorandum dated on or about January 29, 2001.

G. The "Report" means and refers to the Report of the National Energy Policy Development Group, titled "Reliable, Affordable, and Environmentally Sound En-

ergy for America's Future," and published on or about May 16, 2001.

H. "Sub-Group(s)" means and refers to Any working groups, including without limitation the Task Force Working Group chaired by Andrew Lundquist, the working groups established by each agency, and all committees, sub-committees, teams or other sub-groups that participated in the activities of the Task Force or the preparation of the Report, including without limitation working groups, sub-committees, team, or other sub-groups within any federal agencyor entity.

REQUESTS FOR PRODUCTION

1. All documents identifying or referring to any staff, personnel, contractors, consultants or employees of the Task Force.

2. All documents establishing or referring to any Sub-Group.

3. All documents identifying or referring to any staff, personnel, contractors, consultants or employees of any Sub-Group.

4. All documents identifying or referring to any other persons participating in the preparation of the Report or in the activities of the Task Force or any Sub-Group.

5. All documents concerning any communication relating to the activities of the Task Force, the activities of any Sub-Groups, or the preparation of the

Report, between any person (excluding full-time federal employees) and

(a) the Task Force;

(b) any member of the Task Force;

(c) any staff or personnel of the Task Force;

(d) any Sub-Groups.

(e) any members of any Sub-Groups

(f) any staff or personnel of any Sub-Groups.

6. All documents concerning any communication relating to the activities of the Task Force, the activities of Sub-Groups, or the preparation of the Report between any person (excluding full-time federal employees) and

(a) the Department of Energy, or any employee or agent of the Department of Energy;

(b) the Department of Commerce, or any employee or agent of the Department of Commerce;

(c) the Department of Agriculture, or any employee or agent of the Department of Agriculture;

(d) the Department of Interior, or any employee or agent of the Department of Interior;

(e) the Department of Treasury, or any employee or agent of the Department of Treasury;

(f) the Department of Transportation, or any employee or agent of the Department of Transportation;

(g) the Environmental Protection Agency, or any employee or agent of the Environmental Protection Agency.

7. All documents concerning activities of the Task Force after September 30, 2001.

8. All documents concerning matters discussed in the January 3, 2002 letter from David Addington, counsel to the Vice President, to Henry Waxman, including but not limited to the October 10, 2001 meeting between a Task Force staff member and representatives of Enron Corporation.

Respectfully submitted,

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I hereby certify that on August 2, 2002 a true and correct copy of the foregoing PLAINTIFF'S FIRST REQUEST FOR PRODUCTION OF DOCUMENTS was served via hand-delivery, on the following:

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/s/ MESEIDY RODRIGUEZ
MESEIDY RODRIGUEZ

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No.: 01-1530 (EGS)

JUDICIAL WATCH, INC., *ET AL.*, PLAINTIFFS

v.

NATIONAL ENERGY POLICY DEVELOPMENT GROUP, *ET AL.*, DEFENDANTS

SIERRA CLUB, PLAINTIFF

v.

VICE PRESIDENT RICHARD CHENEY, *ET AL.*, DEFENDANTS

PLAINTIFFS' FIRST SET OF INTERROGATORIES

Plaintiffs Sierra Club and Judicial Watch hereby request, pursuant to Federal Rule of Civil Procedure 33, that defendants respond to the interrogatories below by September 3, 2002.

DEFINITIONS AND INSTRUCTIONS

A. "Person" means and refers to, without limitation, any individual, corporation, partnership, joint venture, limited partnership, association, trust, trustee, group, organization, government or government agency, office, bureau, department, or entity, and all divisions, subdivisions, bureaus, branches, offices or other units thereof, and includes the present and former officers, executives, partners, brokers, employees, agents and all other persons acting or purporting to act on behalf of

them, and any of their present or former parent corporations, subsidiaries, affiliates, divisions, predecessors and successors in interest.

B. "Meeting" means and refers to any use of any mode of conveying meaning or information such as, but not limited to, speech, telephone, telegraph, e-mail, other computer generated or transmitted information, letter, and any written or spoken language for the purpose of transferring information from one person or place to another. When applied to the Task Force or any Sub Group, the term "meeting" includes all meetings of two or more persons where Task Force or Sub Group activities were discussed.

C. "Communication" includes, without limitation, any oral, written or electronic transmission of information including, without limitation, meetings, discussions, conversations, telephone calls, memoranda, telecopies, telexes, conferences, facsimiles, seminars, messages, notes, or memoranda.

D. "Participate" means any form of presence, observation, communication, or other involvement, including without limitation by use of telephone, computer, or video-conference, and including without limitation the submission of letters, reports, memoranda, or opinions.

E. "Any" shall be understood to encompass "all."

F. The "Task Force," means and refers to the National Energy Policy Development Group, as described in President George W. Bush's memorandum dated on or about January 29, 2001.

G. The "Report" means and refers to the Report of the National Energy Policy Development Group, titled "Reliable, Affordable, and Environmentally Sound En-

ergy for America's Future," and published on or about May 16, 2001, or any draft of this report.

H. "Sub-Group(s)" means and refers to any working groups, including without limitation the Task Force Working Group chaired by Andrew Lundquist, the working groups established by each agency, and all committees, sub-committees, teams or other sub-groups that participated in the activities of the Task Force or the preparation of the Report, including without limitation working groups, sub-committees, team, or other sub-groups within any federal agency or entity.

I. "Identify" means, with respect to an individual, state that person's full name, title, and last known business address and phone number.

J. Defendants are required to provide all information available to them at the time of their responses, regardless of whether the information is known to defendants, their representatives, agents, investigators or attorneys.

K. Pursuant to Rule 26(e) F. R. Civ. P., these interrogatories should be considered continuing, and defendants are required to update them if new information becomes available to them after their initial response.

L. If you object to responding to any interrogatory on the basis of privilege, please state the factual and legal basis for such objection.

INTERROGATORIES

1. Please state the dates, times, locations of, and identify all persons who were present at each meeting of the Task Force.

2. For each Task Force member, please provide a description of the member's role in the preparation of the Report and the activities of the Task Force;

3. Please identify all Task Force staff, personnel, consultants, employees, and all other persons who participated, in any manner, in the activities of the Task Force or the preparation of the Report.

4. For each person listed in response to Interrogatory 3, above, please provide:

a) A description of the person's role in the activities of the Task Force and in preparation of the Report.

b) A list of all meetings relating to the preparation of the Report and/or the activities of the Task Force in which the person participated, including the date and time of the meeting and identity of all persons who participated at the meeting.

5. Please list all federal agencies, offices, or other entities that participated, in any manner, in Task Force activities or preparation of the Report.

6. For each agency, office, or entity listed in response to Interrogatory 5, above, please:

a) Provide a description of the agency's, office's, or entity's participation in the activities of the Task Force and/or the preparation of the Report;

b) Identify all persons who were involved with the agency's, office's, or entity's participation in the activities of the Task Force and/or the preparation of the Report;

i) For each person listed in response in Interrogatory 6(b), above, describe the person's role in

of the agency's, office's, or entity's participation in the activities of the Task Force and/or the preparation of the Report;

ii) For each person listed in response to Interrogatory 6(b), above, please provide a list of all meetings relating to the agency's, office's, or entity's participation in the activities of the Task Force and/or the preparation of the Report, in which the person participated, including the date and time of the meeting and the identity of all persons who participated in the meeting;

7. Please list all Sub-Groups that participated, in any manner, in the activities of the Task Force and/or the preparation of the Report.

8. For each Sub-Group listed in response to Interrogatory 7, above, please:

a) describe the role or function of the Sub-Group in the activities of the Task Force and/or the preparation of the Report;

b) identify all persons who participated in the activities of the Sub-Group;

c) list all meetings of the Sub-Group, including the date and time of the meeting and the identity of all Persons who participated at the meeting.

9. For each Person listed in response to Interrogatory 8(b), above, please:

a) Describe the person's role in the preparation of the Report, the activities of the Task Force, and/or the activities of Sub-Group(s).

b) list all meetings relating to the preparation of the Report, the activities of the Task Force, and/or

the activities of Sub-Group(s), in which the person participated, including the date and time of the meeting and the identity of all persons who participated in the meeting.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 2, 2002 a true and correct copy of the foregoing PLAINTIFF'S FIRST REQUEST FOR PRODUCTION OF DOCUMENTS was served via hand-delivery, on the following:

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

C.A. No. 01-1530 (EGS)

JUDICIAL WATCH, INC., *ET AL.*, PLAINTIFFS

v.

NATIONAL ENERGY POLICY DEVELOPMENT GROUP, *ET AL.*, DEFENDANTS

C.A. No. 02-631 (EGS)

SIERRA CLUB, PLAINTIFF

v.

VICE PRESIDENT RICHARD CHENEY, *ET AL.*, DEFENDANTS

DEFENDANTS' RESPONSES TO PLAINTIFFS' FIRST SET OF INTERROGATORIES AND REQUESTS FOR PRODUCTION

Pursuant to Rules 33 and 34, Fed. R. Civ. P., defendants submit the attached responses to plaintiffs' first set of interrogatories and requests for production. In this document, defendants submit their general objections to plaintiffs' requests. In the attached responses, each defendant responds separately to plaintiffs' inquiries and requests in accordance with the information known to each defendant and his/her agency, as well as

the documents within the possession, custody, or control of each defendant and his/her agency.[10]

As is fully explained in defendants' accompanying motion for a protective order, defendants object to these requests to the extent that they would require the Office of the Vice President and defendants within the Executive Office of the President to reveal information concerning the manner in which that office conducted its deliberations and developed recommendations for the President or the content of any such deliberations. See Memorandum in Support of Defendants' Motion for a Protective Order and for Reconsideration at 6-18. Such requests unconstitutionally interfere with the constitutionally protected right of the President to receive advice in confidence and unduly interferes with the effective functioning of the Executive. *See id.*

For the reasons set forth in defendants' accompanying motion for a protective order, defendants object to discovery against the Vice President to the extent it is based upon plaintiffs' mandamus claim. *See* Memorandum in Support of Defendants' Motion for a Protective Order and for Reconsideration at 19-21.

Defendants object to the scope of plaintiffs' discovery requests and to the undue burden imposed by them. The scope of plaintiffs' requests is broader than that reasonably calculated to lead to admissible evidence.

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[10] Defendants acknowledge that the Court has previously indicated that it will entertain only specific objections to plaintiffs' requests. We have included in each defendant's responses objections which are specific to individual requests. We state our general objections here for purposes of clarity for the record and to preclude any later argument that, by not including them here, those general objections have been waived.

Defendants object to the instructions and definitions contained in plaintiffs' requests to the extent that they impose burdens greater than those imposed by the Federal Rules of Civil Procedure.

Defendants object to plaintiffs' definition of "meeting" as including any form of communication between two or more persons as an overly broad definition beyond the meaning of the term "meeting" as used in the Federal Advisory Committee Act, 5 U.S.C. App. § 10. Nongovernment individuals should be considered "members" of an advisory committee only if their "involvement and role are functionally indistinguishable from those of the other members. . . . If a 'consultant' regularly attends and fully participates in working group meetings as if he were a 'member,' he should be regarded as a member." *Association of Am. Physicians and Surgeons* v. *Clinton*, 997 F.2d 898, 915 (D.C. Cir. 1993) ("AAPS"). Consistent with this definition of membership in an advisory committee, "episodic meetings between government officials and a consultant" would not serve to transform the consultant into a member of the advisory committee. *Id.* "When an advisory committee of wholly government officials brings in a 'consultant' for a one-time meeting, FACA is not triggered because the consultant is not really a member of the advisory committee." *Id.* Since any form of communication between two or more persons is not sufficient to implicate FACA, plaintiffs' definition of "meeting" is overly broad and unduly burdensome.

Defendants object to these requests as plaintiffs' cause of action arises under the Administrative Procedure Act, and review in APA cases is limited to the record absent a "'strong showing of bad faith or improper behavior' or when the record is so bare that it

prevents effective judicial review." *Commercial Drapery Contractors, Inc.* v. *United States*, 133 F.3d 1, 7 (D.C. Cir. 1998). As plaintiffs have made no such showing, discovery is inappropriate in this case. *See* Memorandum in Support of Defendants' Motion for a Protective Order and for Reconsideration at 18-19.

Respectfully submitted,

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